

## Child Statements in a Post-*Crawford* World: What the United States Supreme Court failed to consider with regard to child victims and witnesses

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### I. INTRODUCTION

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With the issuance of *Crawford v. Washington*<sup>2</sup> by the United States Supreme Court on March 8, 2004, wide spread confusion and concern swept through the nation's prosecutorial community. The new rule announced in *Crawford* created too many questions and provided few answers by the Court. In particular, anxiety arose from the child protection community in regard to one primary issue: **Are forensic interviews of child victims and witnesses, and other statements made by children, considered "testimonial statements" according to *Crawford*, thus requiring the child to take the witness stand?**

The Court further confused the new rule with the combined opinions in *Davis v. Washington* and *Indiana v. Hammon*.<sup>3</sup> In that opinion, the court focused on the issue of excited utterances and utterances through 911 emergency calls primarily occurring from domestic violence situations, and whether emergency situations fall into the definition of a "testimonial statement." In its opinion of June 2006, the Court developed a new "primary purpose" test where courts will now objectively view the circumstances surrounding the purpose of the law enforcement investigator in speaking with the witness.<sup>4</sup>

Thus, the question after *Davis/Hammon* becomes "what is the primary purpose of the interrogation by law enforcement" and how does this work with the *Crawford* objective reasonable person factor? This article will analyze: (1) whether forensic interviews are testimonial statements under the new rule set forth in *Crawford*; (2) how courts across the country are inaccurately analyzing *Crawford* in relation to child forensic interviews; (3) how courts should handle statements made by children to medical professionals and others taking their statements; and (4) how the United States Supreme Court, and lower courts, are sacrificing its young<sup>5</sup> child victims and witnesses by imposing cognitively impossible adult thought processes on very young children.

## II. THE NEW RULE OF *CRAWFORD* v. WASHINGTON

*Crawford v. Washington* addressed whether a taped custodial statement made by the defendant's wife could be admitted as substantive evidence against the defendant, her husband, when the wife did not testify at trial as a result of marital privilege. The prosecutor in *Crawford* was permitted to introduce the videotape at trial since statements made by the defendant's wife were statements against her penal interest. On appeals at the state level, the Washington Court of Appeals and Washington Supreme Court addressed the introduction of the taped statement on reliability and trustworthiness grounds pursuant to *Ohio v. Roberts*.<sup>6</sup>

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<sup>2</sup> 514 U.S. 36 (2004).

<sup>3</sup> 126 S. Ct. 2266 (U.S. 2006).

<sup>4</sup> Id. at \*16.

<sup>5</sup> For purposes of this article, the term "young child" refers to children under the age of ten.

<sup>6</sup> 448 U.S. 56 (1980). The Roberts Court held that if a witness becomes unavailable at trial, the prosecutor has the burden to prove unavailability of that witness and that the hearsay statement falls into a firmly rooted exception, or has "indicia of reliability" or trustworthiness.

The United States Supreme Court overturned the conviction against the defendant and analyzed the admission of Mrs. Crawford's statement on purely Sixth Amendment confrontation grounds. In doing so, the Court set forth a new rule regarding admission of hearsay testimony when the witness is unavailable to testify. **The new rule provides: "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation."**<sup>7</sup> Thus, if an out-of-court statement by a witness is deemed testimonial, the Sixth Amendment Confrontation Clause requires that the witness testify and be subject to confrontation or cross-examination before admitting any out-of-court statements.

A. Testimonial statements now require confrontation

Before *Crawford*, courts would revert to the Rules of Evidence and a line of cases stemming from *Ohio v. Roberts*<sup>8</sup> to assess whether out-of-court hearsay statements would be reliable and trustworthy in order to be admitted at trial. The *Crawford* Court overturned *Roberts* and set forth a new rule that requires witnesses to testify at trial, and be subject to cross examination, before admitting any out-of-court testimonial hearsay statements from that witness. In announcing the new rule, the United States Supreme Court failed to provide a clear definition of what constitutes a "testimonial statement" and stated "[w]e leave for another day any effort to spell out a comprehensive definition of "testimonial."<sup>9</sup> Nonetheless, the court outlined three core classifications of statements that might be considered testimonial:

- (1) "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,"
- (2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," (citations omitted); or
- (3) "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."<sup>10</sup>

In looking to the foundation of the Sixth Amendment, the *Crawford* Court focused on witnesses who "bear testimony against the accused" and found that "[t]estimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."<sup>11</sup>

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<sup>7</sup> *Crawford*, 514 U.S. at 54.

<sup>8</sup> 448 U.S. 56 (1980).

<sup>9</sup> *Crawford*, 541 U.S. at 53. That later day appeared to have arrived on June 19, 2006, when the Court issued the combined opinions in *Davis* and *Hammon*, yet again failed to provide a comprehensive definition of what constitutes a testimonial statement. 126 S. Ct. 2266; 165 L. Ed. 2d 224; 2006 U.S. LEXIS 4886 (2006).

<sup>10</sup> *Crawford*, 541 U.S. at 28.

<sup>11</sup> *Crawford*, 541 U.S. at 51.

The Court further held that “[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.” Thus, if a witness previously testified and an opportunity to cross-examination was provided, that testimony may later be admitted in court if the witness is unavailable. In the end, the Supreme Court minimally agreed that a “testimonial statement” could come from statements provided in “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and police interrogations.”<sup>12</sup>

B. Post-Crawford Courts struggle to define the parameters of “testimonial statements.”

Post-Crawford courts have struggled with defining testimonial statements and have held that testimonial statements include testimony from a preliminary hearing,<sup>13</sup> before a grand jury,<sup>14</sup> at a deposition,<sup>15</sup> at trial,<sup>16</sup> or at a former trial;<sup>17</sup> affidavits;<sup>18</sup> witness responses to police

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<sup>12</sup> Crawford, 541 U.S. at 54.

<sup>13</sup> State v. Young, 87 P.3d 308 (Kan. 2004) (A witness was unavailable for trial but testified at preliminary hearing. The Defendant was represented by counsel at his preliminary hearing and had an opportunity to cross-examine the witness. The Defendant’s counsel did not cross-examine the witness at preliminary examination, but was afforded that opportunity. The Defendant’s counsel’s failure to cross-examine the witness does not equate to a Confrontation Clause violation and does not bar the preliminary hearing testimony from admission at trial due to unavailability of the witness.). Although statements at a preliminary hearing are testimonial in nature, if the statements were subject to confrontation and the witness later becomes unavailable, the testimony may be later admitted, pursuant to FRE 804(b)(1), as confrontation was satisfied. For support, see, Schneider v. Commonwealth, 47 Va. App. 609, 625 S.E.2d 688 (Va. Ct. App. 2006); State v. Skakel, 888 A.2d 985 (Conn. 2006); People v. Stewart, No. 246334, 2004 Mich. App. LEXIS 2110 (Mich. Ct. App. August 10, 2004); State v. Newell, 2005 Ohio 2848 (Ohio Ct. App. 2005); People v. Ochoa, 121 Cal. App. 4th 1551 (Cal. Ct. App. 2004); Primeaux v. State, 88 P.2d 893 (Okla. Crim. App. 2004)

<sup>14</sup> United States v. Lore, 430 F.3d 190 (3rd Cir. 2005); United States v. Thompson, No. 4:05CR00161 HEA, 2005 U.S. Dist. LEXIS 27763 (E.D. Mo. November 14, 2005) (Grand jury testimony, not subject to cross examination, of a deceased witness may be admitted at a subsequent suppression hearing because hearsay is admissible at suppression hearings); People v. Howell, 831 N.E.2d 681 (Ill. App. Ct. 2005) (confrontation violation to admit grand jury testimony at trial of non-testifying witness due to inability to cross examine during the grand jury testimony.); People v. Patterson, 808 N.E.2d 1159 (Ill. App. Ct. 2004) (if witness testifies at grand jury and is not subject to cross examination, the grand jury testimony cannot be admitted at trial unless the witness testifies at trial and is subject to cross examination regarding testimony given before the grand jury.)

<sup>15</sup> Oliver v. Hendricks, No. 04-4219, 2006 U.S. Dist. LEXIS 34914 (D.N.J. May 31, 2006) (A witness was terminally ill with cancer and unlikely to survive until trial. The witness was deposed and the defense was given an opportunity to cross examine at the deposition. At trial, the court found the witness to be unavailable and properly admitted the deposition. There was no Crawford violation.); Simmons v. State, No. CACR04-1279 2006 Ark. App. LEXIS 276 (Ark. Ct. App. April 19, 2006) (“We hold that a deposition taken in anticipation of a future civil trial constitutes a “testimonial” statement as required by Crawford. \*\*\* [A]lthough Simmons’s civil attorney chose not to cross examine Desanto during the deposition, criminal charges had been filed against Simmons, and his attorney had the opportunity to depose Desanto. The civil trial and the criminal trial involved the same facts and the same participants. The attorney for the co-defendant that cross examined Desanto had the same motive as Simmons--to discredit his testimony regarding the sexual encounters.” No violation for admitting the deposition at the criminal trial.); United States v. Moffie, No. 1:04 CR 567, 2005 U.S. Dist. LEXIS 9462 (N.D. Ohio May 11, 2005) (prior civil deposition testimony of a defendant is admissible as a party-admission in a subsequent criminal case); State v. Ash, 611 S.E.2d 855 (N.C. Ct. App. 2005) ; Liggins v. Graves, No. 4:01-cv-40166, 2004 U.S. Dist. LEXIS 4889 (S.D. Iowa March 24, 2004) (videotaped deposition may be admitted in a later trial so long as the witness is unavailable

interrogation;<sup>19</sup> co-defendant confessions and plea allocutions of co-defendants that implicate other defendants.<sup>20</sup> On the other hand, these hearsay statements have been deemed non-

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and was subject to cross examination at the deposition); and *Howard v. State*, 816 N.E.2d 948 (Ind. 2004) (a pre-trial deposition, providing an opportunity for cross-examination, may later be admitted at trial if the witness is unavailable.)

<sup>16</sup> *People v. Whitley*, No. 1936-2002, 11 Misc. 3d 1084A, (N.Y. County Ct. 2006) (Introducing the prior trial testimony of two unavailable witnesses at this trial will not violate *Crawford* since the defendant had a previous opportunity to cross-examine.); *Farmer v. State*, 124 P.3d 699 (Wyo. 2005) (A key witness testified at defendant's first trial, but was not able to be located for the second trial. Admission of the transcript from the first trial did not violate defendant's confrontation rights. Defendant claimed that the cross-examination at the first trial was insufficient. The court denied this claim and held that under federal rules, a defendant need only be given the "opportunity" to cross-examine, not a cross-examination that is effective.); *State v. Hale*, 691 N.W.2d 637 (Wis. 2005) (The transcript of an unavailable witness who testified previously at a co-defendant's separate trial cannot be utilized during another defendant's trial as the testimony is deemed testimonial and would violate the defendant's right to confrontation.).

<sup>17</sup> *United States v. Avants*, 367 F.3d 433 (5th Cir. 2004) (A murder case was tried in state court and resulted in an acquittal, and was then subsequently tried in federal court. The main witness in the state trial died prior to the federal trial, but his original state trial testimony was properly admitted in the federal trial since the witness was unavailable and the defendant had a prior opportunity to cross-examine the witness.)

<sup>18</sup> *Hammon v. Indiana*, 126 S. Ct. 2266; 165 L. Ed. 2d 224 (U.S. 2006) (the affidavit from a victim of an alleged domestic assault, detailing the crime, was testimonial in nature as it was taken to preserve the victim's account of a past crime); *People v. Pacer*, 21 A.D.3d 192 (N.Y. App. Div. 2005) (An affidavit of regularity/proof of mailing sworn regarding a driver's license revocation order was not a business record from a regularly conducted business activity and was testimonial); *United States v. Wittig*, No. 03-40142-JAR, 2005 U.S. Dist. LEXIS 10067 (D. Kan. May 23, 2005) (witness affidavits are testimonial under *Crawford*).

<sup>19</sup> *Davis v. Washington* and *Hammon v. Indiana*, 126 S. Ct. 2266; 165 L. Ed. 2d 224 (U.S. 2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"); *State v. Parks*, 116 P.3d 631 (Ariz. Ct. App. 2005) (excited utterances made after police questioning are testimonial); *People v. Victors*, 819 N.E.2d 311 (Ill. App. Ct. 2004) (excited victim who calms down and is subject to interview by police is testimonial); *People v. Cortes*, 781 N.Y.S.2d 401 (N.Y. Sup. Ct. 2004) (interrogation by 911 operator is testimonial); *Richardson v. Newland*, 342 F. Supp. 2d 900 (E.D. Cal. 2004) (witness statements given to police officers are testimonial); *United States v. Manfre*, 368 F.3d 832 (8th Cir. 2004) ("an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."); *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) (police questioning during a Terry stop qualifies as interrogation and is testimonial); *State v. Lewis*, 619 S.E.2d 830 (N.C. 2005) (a police photo line up identification is testimonial).

<sup>20</sup> *See*, *State v. Alston*, 900 A.2d 1212 (R.I. 2006); *State v. Walters*, 137 P.3d 645 (N.M. Ct. App. 2006); *People v. Pipes*, 715 N.W.2d 290 (Mich. 2006); *United States v. Becker*, No. 01 Cr. 156 2006 U.S. Dist. LEXIS 2076 (S.D.N.Y. January 17, 2006); *United States v. Alfonso*, 158 Fed. Appx. 356 (2<sup>nd</sup> Cir. 2005); *State v. Vincent*, 120 P.3d 120 (Wash. Ct. App. 2005); *United States v. Bermudez*, 138 Fed. Appx. 339 (2d Cir. 2005); *State v. Sanlin*, No. W2004-00841-CCA-R3-CD, 2005 Tenn. Crim. App. LEXIS 451 (Tenn. Crim. App. May 6, 2005); *United States v. Rozenfeld*, 131 Fed. Appx. 759 (2d Cir. . 2005); *United States v. Molina*, 407 F.3d 511 (1st Cir. 2005); *United States v. Foster*, 127 Fed. Appx. 537 (2d Cir. 2005); *United States v. Massino*, 319 F.Supp. 2d 295 (E.D.N.Y. 2004); *People v. Woods*, 9 A.D.3d 293 (N.Y. App. Div. 2004); *United States v. Sherry*, 107 Fed. Appx. 253 (2d Cir. 2004); *United States v. Tusaneza*, 116 Fed. Appx. 305 (2d Cir. 2004); *United States v. De La Cruz*, 114 Fed. Appx 293 (2d Cir. 2004); *United States v. Hundley*, No. 02 Cr. 441 2004 U.S. Dist. LEXIS

testimonial thus far: (1) hearsay statement admitted at probation revocation or supervised release revocation proceedings since the right of confrontation is not afforded in those hearings;<sup>21</sup> (2) casual statements made to an acquaintance or family member;<sup>22</sup> (3) co-conspirator statements made in furtherance of the conspiracy;<sup>23</sup> (4) brief, informal, remarks to an officer who is

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21574 (S.D.N.Y. October 28, 2004); *State v. Cutlip*, 2004 Ohio 2120 (Ohio Ct. App. 2004); *Brooks v. State*, 132 S.W.3d 702 (Tex. Crim. App. 2004); *People v. Bell*, 689 N.W.2d 732 (Mich. Ct. App. 2004); *State v. Pullen*, 594 S.E.2d 248 (N.C. Ct. App. 2004); *Roy v. Coplan*, 2004 DNH 56 (D.N.H. 2004).

<sup>21</sup> See, *State v. Crace*, 2006 Ohio 3027 (Ohio Ct. App. 2006) (community control revocation hearing); *State v. Rose*, 2006 Ida. App. LEXIS 54 (Idaho Ct. App. 2006); *United States v. Wooden*, 179 Fed. Appx. 601 (11th Cir. 2006); *United States v. Kelley*, 446 F.3d 688 (7th Cir. 2006); *State v. Lewis*, No. 55582-1-I 2006 Wash. App. LEXIS 113 (Wash. Ct. App. January 30, 2006); *Commonwealth v. Wilcox*, 841 N.E.2d 1240 (Mass. 2006); *Commonwealth v. Nunez*, 841 N.E.2d 1250 (Mass. 2006); *Commonwealth v. Kendrick*, 841 N.E.2d 1235 (Mass. 2006); *Russell v. State*, 920 So. 2d 683 (Fla. Dist. Ct. App. 2006); *United States v. Rondeau*, 430 F.3d 44 (1st Cir. 2005); *United States v. Hall*, 419 F.3d 980 (9th Cir.2005); *United States v. Kirby*, 418 F.3d 621 (6th Cir. 2005); *United States v. Morris*, 140 Fed. Appx. 138 (11th Cir. 2005); *Young v. United States*, 863 A.2d 804 (D.C. 2004); *Jenkins v. State*, No. 133, 2004 Del. LEXIS 549 (Del. 2004); *People v. Johnson*, 121 Cal. App. 4th 1409 (Cal. Ct. App. 2004); *People v. Turley*, 109 P.3d 1025 (Colo. Ct. App. 2004); *United States v. Aspinall*, 389 F.3d 332 (2d Cir. 2004); *United States v. Barazza*, 318 F. Supp. 2d 1031 (S.D. Cal. 2004).

<sup>22</sup> See, *Griffin v. State*, 631 S.E.2d 671 (Ga. 2006) (statement of a deceased victim to a friend was non-testimonial); *United States v. Portocarrero-Reina*, No. 8:05-CR-365-T-27TBM, 2006 U.S. Dist. LEXIS 47080 (M.D. Fla. July 12, 2006) (“*Crawford* does not apply either to “casual remark[s] made to an acquaintance” or statements made unwittingly to a government informant, as those statements are not “testimonial.”); *State v. Miller*, 896 A.2d 844 (Conn. Ct. App. 2006) (A casual remark to a friend is not deemed testimonial under *Crawford*.); *State v. Aaron L.*, 865 A.2d 1135 (Conn. 2005) (casual statement by a two-and-one-half year old child victim to her mother was non-testimonial); *United States v. Pugh*, 405 F.3d 390 (6th Cir. 2005); *United States v. Manfre*, 368 F.3d 832 9162 (8th Cir. 2004); *People v. Cervantes*, 118 Cal. App. 4th 162 (Cal. Ct. App. 2004) (defendant’s confession was made to a witness to explain injuries he received during the commission of the murder and with reasonable expectation it would not be repeated. This was non-testimonial).

<sup>23</sup> See, *United States v. Sullivan*, 455 F.3d 248 (4th Cir. 2006); *United States v. Amato*, No. 03-CR-1382, 2006 U.S. Dist. LEXIS 38176 (E.D.N.Y. June 8, 2006); *State v. Whitaker*, 135 P.3d 923 (Wash. Ct. App. 2006); *Bowden v. State*, 630 S.E.2d 792 (Ga. Ct. App. 2006); *United States v. Underwood*, 446 F.3d 1340 (11th Cir. 2006); *United States v. Crespo-Hernandez*, No. 05-10461, 2006 U.S. App. LEXIS 11576 (5th Cir. May 9, 2006); *United States v. Peak*, No. 05-510 2006 U.S. Dist. LEXIS 21379 (E.D. Pa. April 20, 2006); *United States v. Abram*, 171 Fed. Appx. 304 (11th Cir. 2006); *United States v. Bridgeforth*, 441 F.3d 864 (9th Cir. 2006); *United States v. Reynolds*, 171 Fed. Appx. 961 (3rd Cir. 2006); *United States v. Brooks*, 173 Fed. Appx. 848 (1st Cir. 2006); *State v. Hand*, 840 N.E.2d 151 (Ohio 2006); *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006); *State v. Breeden*, No. E2004-01512-CCA-R3-CD 2005 Tenn. Crim. App. LEXIS 1257 (Tenn. Crim. App. November 30, 2005); *United States v. Allen*, 425 F.3d 1231 (9th Cir. 2005); *Harris v. Moore*, No. 03-5847, 2005 U.S. Dist. LEXIS 29265 (D.N.J. November 22, 2005) (tape recorded phone conversation); *Jones v. State*, 834 N.E.2d 167 (Ind. Ct. App. 2005); *United States v. Sanchez-Berrios*, 424 F.3d 65 (1st Cir. 2005); *United States v. Wilson*, 148 Fed. Appx. 602 (9th Cir. 2005); *United States v. Jenkins*, 419 F.3d 614 (7th Cir. 2005); *People v. Wahlert*, No. E035174, 2005 Cal. App. LEXIS 1108 (Cal. App. 4th Dist. July 19, 2005); *United States v. Hoffman*, No. 04-334-1, 2005 U.S. Dist. LEXIS 5572 (E.D. Pa. April 5, 2005); *Bush v. State*, 895 So.2d 836 (Miss. 2005); *United States v. Delgado*, 401 F.3d 290 (5th Cir. 2005); *United States v. Hendricks*, 395 F.3d 173 (3rd Cir. 2005); *Wiggins v. State*, 152 S.W.3d 656 (Tex. Ct. App. 2004); *United States v. Robinson*, 367 F.3d 278 (5th Cir. 2004); *United States v. Cozzo*, No. 02 CR 400, 2004 U.S. Dist. LEXIS 7391 (N.D. Ill. April 28, 2004); *State v. Saechao*, 98 P.3d 1144 (Or. Ct. App. 2004); *Llaca v. Duncan*, 2004 U.S. Dist. LEXIS 7916 (S.D.N.Y. May 4, 2004).

conducting a field investigation;<sup>24</sup> (5) dying declarations;<sup>25</sup> and (6) business records and public records.<sup>26</sup>

C. The United States Supreme Court never defined “testimonial statements” prior to *Crawford*

Despite the lack of guidance provided by the *Crawford* court, cases predating *Crawford* referenced the term “testimonial” in many scenarios; yet no case defined the term in relation to the new rule of *Crawford*. The earliest case utilizing the term “testimonial” in relation to statements of witnesses was *Valdez v. United States*.<sup>27</sup> The opinion referenced “[t]he alleged right of a defendant to be present at a view cannot be derived from the right of confrontation with witnesses given by the Sixth Amendment. Such right applies only to testimonial evidence.” The case of *White v. Illinois*,<sup>28</sup> started us on the road toward “testimonial statements” through a concurring opinion written by Justices Scalia and Thomas: “The federal constitutional right of

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<sup>24</sup> People v. Newland, 6 A.D.3d 330 (N.Y. App. Div. 2004).

<sup>25</sup> See, People v. Mayo, 140 Cal. App. 4th 535 (Cal. Ct. App. 2006); State v. Young, 710 N.W.2d 272 (Minn. 2006); Commonwealth v. Morgan, 69 Va. Cir. 228 (Va. Cir. Ct. 2005); People v. Paul, 25 A.D.3d 165 (N.Y. App. Div. 2005) (Dying declarations made by the deceased victim to two civilian eyewitnesses were not non-testimonial under both Professor Amar and Professor Friedman’s tests.); Wallace v. State, 836 N.E.2d 985 (Ind. Ct. App. 2005); State v. Jones, No. A04-1284, 2005 Minn. App. Unpub. LEXIS 142 (August 9, 2005); State v. Martin, 695 N.W.2d 578 (Minn. 2005); People v. Gilmore, 828 N.E.2d 293 (Ill. App. Ct. 2005); Commonwealth v. Salaam, 65 Va. Cir. 405 (Va. Cir. Ct. 2004); People v. Monterroso, 101 P.3d 956 (Cal. 2004); State v. Nix, 2004 Ohio 5502 (Ohio 2004). However, be aware that one case has found dying declarations to be testimonial under *Crawford*. See, United States v. Jordan, No. 04-CR-229-B, 2005 U.S. Dist. LEXIS 3289 (D. Colo. March 3, 2005)

<sup>26</sup> See, Acuna v. Commonwealth, No. 1396-05-4, 2006 Va. App. LEXIS 306 (Va. Ct. App. July 11, 2006) (a record from Department of Motor Vehicles); Johnson v. State, No. 05-05-00848-CR, 2006 Tex. App. LEXIS 5460 (Tex. Crim. App. June 27, 2006) (DNA report); Fencher v. State, 931 So. 2d 184 (Fla. Dist. Ct. App. 2006) (rape kit records); Rollins v. State, 897 A.2d 821 (Md. 2006) (autopsy report); United States v. Salazar-Gonzalez, 445 F.3d 1208 (9th Cir. 2006) (a Certificate of Non-Existence of Record); United States v. Evans, 178 Fed. Appx. 747 (9th Cir. 2006); United States v. McIntosh, 2006 U.S. App. LEXIS 11057 (7<sup>th</sup> Cir. Ill. 2006); United States v. Page, 169 Fed. Appx. 782 (4<sup>th</sup> Cir. W.Va. 2006) (a certified penitentiary packet); Michels v. Commonwealth, 47 Va. App. 461, 624 S.E.2d 675 (Va. Ct. App. 2006) (documents from the Delaware Secretary of State); Smith v. State, 2005 Ind. App. LEXIS 2442 (Ind. Ct. App. 2005) (cell phone records); United States v. King, 161 Fed. Appx. 296 (4<sup>th</sup> Cir. 2006); Sproule v. State, 927 So. 2d 46 (Fla. Dist. Ct. App. 2006) (a certified driving record); People v. Romano, 9 Misc. 3d 1127A (N.Y. Sup. Ct. 2005) (computerized record of the Department of Finance, Parking Violations Bureau, listing the effective date and the expiration date of the license plate of [a car] is a routine business record); United States v. Rankin, 63 M.J. 552 (N-M.Ct. Crim. App. 2006) (service record entries for a period of unauthorized absence); United States v. Cantellano, 430 F.3d 1142 (11<sup>th</sup> Cir. 2005) (a warrant of deportation record); State v. Bellerouche, 120 P.3d 971 (Wash. Ct. App. 2005) (trespass notice); Peterson v. State, 911 So. 2d 184 (Fla. Dist. Ct. App. 2005) (department of corrections records); Ellis v. Phillips, No. 04 Civ. 7988, 2005 U.S. Dist. LEXIS 13910 (S.D.N.Y. 2005) (DNA results); Eslora v. State, No. 04-04-00112-CR, 2005 Tex. App. LEXIS 2564 (Tex. Ct. App. 2005) (Medical records); Smith v. State, 898 So. 2d 907 (Ala. Crim. App. 2004) (Autopsy reports); People v. Shreck, 107 P.3d 1048 (Colo. Ct. App. 2004) (Judgment of conviction); United States v. Gutierrez-Gonzales, 111 Fed. Appx. 732 (5<sup>th</sup> Cir. 2004) (Immigration records).

<sup>27</sup> 244 U.S. 432 (1917).

<sup>28</sup> 502 U.S. 346 (1992).

confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.”<sup>29</sup> In addition, the United States Supreme Court has ruled on cases that address testimonial privileges;<sup>30</sup> testimonial incrimination by a defendant;<sup>31</sup> and testimonial compulsion of a defendant.<sup>32</sup> Yet, no case from the United States Supreme Court provided a pre-*Crawford* definition of a testimonial statement. *Crawford*, and now *Davis* and *Hammon*, continue the pattern of vagueness by failing to establish clear guidelines on testimonial versus non-testimonial statements. As a result, prosecuting attorneys and their investigators do not know what out-of-court statements of unavailable witnesses are eligible for admission in court.

D. The United States Supreme Court provides a limited definition of “testimonial statements” in *Davis* and *Hammon*

When provided the opportunity to clarify the meaning of a “testimonial statement” in *Davis v. Washington* and *Hammon v. Indiana*, the Court only provided a definition for these two cases and those like them:

Without attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation -- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>33</sup>

In a footnote to the above ruling, the Court noted the following: “Our holding refers to interrogations because, as explained below, the statements in the cases presently before us are the products of interrogations -- which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial.”<sup>34</sup>

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<sup>29</sup> *White*, 502 U.S. at 365.

<sup>30</sup> *Jaffe v. Redmond*, 518 U.S. 1 (1996).

<sup>31</sup> *Braswell v. U.S.*, 487 U.S. 99 (1988).

<sup>32</sup> *U.S. v. Dionisio*, 410 U.S. 1 (1973).

<sup>33</sup> 2006 U.S. LEXIS 4886, at \*16.

<sup>34</sup> 126 S. Ct. at 2274..



#### E. An Effective Test to Utilize to Determine a Testimonial Statement

In struggling with the open field of interpretations on what constitutes a testimonial statement, an effective test arising out of the *Crawford* decision can be determined, and lower courts have addressed these two factors in determining whether a statement was testimonial: (1) Was a governmental agent involved in creating the testimony or in taking a formalized statement and (2) Would an objective declarant reasonably expect his/her statement to later be used at trial?<sup>35</sup> Consistent with the three classifications outlined in the *Crawford* opinion, if the answer to both questions is in the affirmative, then the statement should be deemed testimonial requiring the witness to testify. If the answer to either prong is in the negative, then the statement should be deemed non-testimonial, thus allowing for admission of the statement through the hearsay exceptions in the Rules of Evidence.<sup>36</sup>

For example, if an out-of-court statement is taken by a government agent (e.g. police officer, prosecutor, or child protective services (CPS) worker employed by the state), the statement will be considered testimonial so long as the witness reasonably could expect that statement would later be used at trial. However, if the statement is deemed testimonial, but was subject to confrontation at a prior time<sup>37</sup> and if the witness is unavailable<sup>38</sup> for trial, that statement may still be admitted as the Sixth Amendment confrontation clause was previously satisfied.

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<sup>35</sup> For a limited sampling of cases, see, *Commonwealth v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006) (although the police were present at the hospital, the police did not conduct the examination of the child, and a child in that position would not anticipate her statements would be used in court); *People v. Vigil*, 127 P.3d 916 (Colo. 2006) (a physician conducted the examination of the child, and no police officer was present, plus the seven-year-old child would not have believed his statement would later be used in court); *People v. McBean*, 819 N.Y.S.2d 368 (N.Y. App. Div. 2006) (Co-defendant's statements to an unknown undercover agent that implicated the defendant were non-testimonial for the reason that the co-defendant was unaware that she was speaking to an undercover agent, her statement lacked formality, and she did not anticipate that her statement would be used in trial.); *Jensen v. Pliler*, 439 F.3d 1086 (9<sup>th</sup> Cir. 2006) (admission of a deceased co-defendant's attorney-client privileged statements to his defense attorney were held non-testimonial because the co-defendant would not believe his statement would be used in court, and his attorney was not a governmental agent); *State v. Staten*, 610 S.E.2d 823 (S.C. Ct. App. 2005) (cited the two-part test as originally published in *A Flurry of Court Interpretations: Weathering the Storm after Crawford v Washington*, by Allie Phillips, J.D., 38:6 THE PROSECUTOR, (November-December 2004)); *United States v. Griggs*, No. 04 Cr. 428 2004 U.S. Dist. LEXIS 23695 (S.D.N.Y. 2004) ("the Second Circuit has subsequently stated that a declarant's statements are testimonial if they are 'knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings.'").

<sup>36</sup> Fed. R. Evid. 801-807.

<sup>37</sup> For example, at a preliminary hearing (probable cause hearing) which provided the defendant an opportunity to cross examine the witness.

<sup>38</sup> Fed. R. Evid. 804(a) outlines the rules of unavailability as follows: "'Unavailability as a witness" includes situations in which the declarant--(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means. A

As a result of the imprecise new rule, prosecutors are questioning whether firmly-rooted hearsay exceptions were still valid, whether convictions would be remanded for retrial due to retroactive application of *Crawford* to active cases and those pending on direct appeal,<sup>39</sup> and whether incompetent witnesses (particularly young children) would ever get their statements heard in court or have their cases effectively prosecuted without their testimony. Of great concern to prosecutors is proceeding to trial if a witness or victim is unavailable to testify.

With the issuance of *Davis/Hammon*, including the Court's new eye toward the "primary purpose" of the interviewer, it is important to note that the court limited its ruling to law enforcement interrogations<sup>40</sup>, commenting, "even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate."<sup>41</sup> Further, "our holding today makes it unnecessary to consider whether and when statements made to someone other than law enforcement personnel are 'testimonial.'"<sup>42</sup> Thus, the court limited the application of the *Davis/Hammon* "primary purpose" ruling to similar cases (interrogations by law enforcement arising out of emergency situations) and did not extinguish the reasonable objective declarant standard set forth in *Crawford*.

#### F. The Impossibility of Applying the *Crawford*, *Davis* and *Hammon* Rules to Child Victims

Every facet of prosecution has been greatly impacted by the *Crawford* decision. Particularly hard-hit are cases of child abuse, domestic violence, elder abuse and other violent crimes where witness intimidation may occur or the witness is unavailable to testify due to injury, trauma, youthfulness, or death. Child abuse cases have been disproportionately impacted by the new rule because the *Crawford* decision fails to take into account the more sensitive cases that have unavailable or incompetent witnesses. When a three-year-old child victim provides an articulate and detailed account regarding the abuse at a forensic interview, yet is deemed incompetent by a trial judge to take an oath in court to provide the same testimony, *Crawford* may potentially bar this testimony. The result seems absurd, yet is occurring with frequency throughout the country.

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declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying."

<sup>39</sup> Lave v. Dretke, 444 F.3d 333 (5<sup>th</sup> Cir. 2006); Dorchy v. Jones, 398 F.3d 783 (6<sup>th</sup> Cir 2005); Bintz v. Bertrand, 403 F.3d 859 (7<sup>th</sup> Cir. 2005); United States v. Jones, 176 Fed. Appx. 920 (10<sup>th</sup> Cir. 2006); In re Rutherford, 437 F.3d 1125 (11<sup>th</sup> Cir. 2006). However, a contrary result has occurred in the Ninth Circuit, beginning with Bocking v. Bayer, 399 F.3d 1010 (9<sup>th</sup> Cir. 2005), cert. granted, 74 U.S.L.W. 3639 (U.S. May 15, 2006) (No. 05-595).

<sup>40</sup> Davis, 2006 U.S. LEXIS 4886, at \*16 (footnote 1).

<sup>41</sup> Davis, 2006 U.S. LEXIS 4886, at \*16 (footnote 1).

<sup>42</sup> Davis, 2006 U.S. LEXIS 4886, at \*17 (footnote 2).

When a child makes statements at a forensic interview<sup>43</sup> regarding criminal conduct, these interviews are often conducted by a governmental agent (child protection service worker or police officer). So should the child's statement be barred as a testimonial statement if the child does not or cannot testify? Some courts have answered in the affirmative and have closed the courtroom doors to young victims. What some courts have failed to consider is the other analysis of *Crawford*: Can an objective declarant in the child's position reasonably understand and expect that his/her statements made during a forensic interview could later be used in court?

If courts are to apply the *Davis/Hammon* "primary purpose" rule to forensic interviews of children, invariably every statement from a child, regardless of age or understanding of the process, would be deemed testimonial. For example, if a police officer, trained in conducting forensic interviews, obtains statements from a five-year-old child victim regarding abuse, arguably the officer's "primary purpose" in speaking with the child would be to obtain sufficient information in order to further investigate and/or arrest the offender. Thus, the "primary purpose" of the interview would be to document facts of a past crime for purposes of prosecution. Therefore, the statements made by the child would be deemed testimonial pursuant to *Davis/Hammon*. Yet when conducting an inquiry into the same factual scenario under the *Crawford* analysis and determining whether an objective witness in the five-year-old child's position would reasonably expect the statement to be used in court, the answer should clearly be no. The absurdity of the "primary purpose" analysis is apparent when attempting to apply the limited scope of the rule to children. However, several courts have taken this step and analyzed a young child's statements under the "primary purpose" rule and found that the statements were testimonial.<sup>44</sup>

Under the minimal guidance provided by the *Crawford* Court, statements made by a young child to a law enforcement officer or child protection worker cannot be deemed testimonial if the child cannot reasonably comprehend that the statements may be later used in court and is not acting in the capacity of a "witness". As noted by Professor Richard Friedman, young children making a statement to the authorities may not understand that sexual abuse is wrong or that a perpetrator is subject to punishment as a result.<sup>45</sup> If so, "it seems dubious to say that the children acting in these cases were acting as witnesses."<sup>46</sup>

The United States Supreme Court failed to take into account the broad sweeping implications the undefined new rule would have on unavailable or incompetent witnesses. The Court made clear that the new rule of *Crawford* was taking aim at the evil of trials by affidavit or trials by hearsay. The Court articulated that the new rule of *Crawford*, and reiterated in *Davis/Hammon*, was aimed at witnesses who bear testimony against an accused. Do young children who disclose abuse to

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<sup>43</sup> See Section III for an explanation of a child forensic interview.

<sup>44</sup> *State v. Krasky*, 696 N.W.2d 816 (Minn Ct App. 2005), *rev'd* 721 N.W.2d 916 (Minn. Ct. App. 2006) (six-year-old's statements to a nurse practitioner were testimonial); *State v. Hooper*, No. 31025, 2006 Ida. App. LEXIS 83 (Idaho Ct. App. 2006) (six-year-old's statements to a nurse were testimonial).

<sup>45</sup> Richard D. Friedman, *Children as Victims and Witnesses in the Criminal Trial Process: The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROB. 243, 250 (2002).

<sup>46</sup> *Id.*

their parent, or to a forensic interviewer in a child-friendly setting, understand that they are a witness bearing testimony? The answer is, and should be, no. The research studies following in this article will outline how statements from very young child abuse victims must be analyzed in the wake of *Crawford v. Washington*, and how appellate courts throughout the country, with a few exceptions, are also failing our youngest and most vulnerable victims.

### III. THE FORENSIC INTERVIEW PROCESS FOR CHILD VICTIMS

A forensic interview can be defined in many terms, but primarily is a method for obtaining an accurate account of events from a child. “The primary goal of the investigative or forensic interview is to obtain and preserve information that the victim is uniquely able to provide. If the child is able to talk, a thorough interview is the first and probably the single most important part of the investigation. It will serve in almost all cases as the basis for evaluating the child’s credibility.”<sup>47</sup> There are several effective forensic interview protocols and training programs throughout the country that properly train child protection professionals in how to talk to children about abuse.<sup>48</sup>

The R.A.T.A.C.<sup>TM</sup> protocol, created by CornerHouse Interagency Child Abuse Evaluation and Training Center in Minneapolis, Minnesota, is utilized in partnership with the American Prosecutors Research Institute in the Finding Words<sup>TM</sup> five-day forensic interviewing course. R.A.T.A.C.<sup>TM</sup> is the acronym for Rapport, Anatomy Identification, Touch Inquiry, Abuse Scenario, and Closure.<sup>49</sup> The R.A.T.A.C.<sup>TM</sup> protocol is a semi-structured protocol, which means that a trained forensic interviewer may move between the five phases according to the wishes and developmental ability of the child, or the disclosure being given, and is not confined to moving through the phases in order. This allows for more flexibility in the interview, as well as accommodation to the child being interviewed. The foundation to R.A.T.A.C.<sup>TM</sup> is the Child First Doctrine, which requires that the needs of the child always come first.<sup>50</sup>

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<sup>47</sup> APRI’S NATIONAL CENTER FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 37 (Sage Publications ed., 3<sup>rd</sup> ed. 2004)

<sup>48</sup> There are a number of organizations that provide quality forensic interviewing training, including the National Child Advocacy Center’s Forensic Interview model in Huntsville, Alabama; the American Professional Society on the Abuse of Child (APSAC), the Childhood Trust based out of the Cincinnati Children’s Hospital Medical Center, and First Witness in Minnesota.

<sup>49</sup> The CornerHouse protocol is also used in the 17 states that are part of the American Prosecutors Research Institute’s Half-A-Nation by 2010 Program and Finding Words<sup>TM</sup> coalition. Those states include: Minnesota, South Carolina, Indiana, New Jersey, Mississippi, Georgia, Missouri, Illinois, Maryland, West Virginia, Kansas, Ohio, Arkansas, Delaware, Virginia, Connecticut and Oklahoma. Two to three states continue to join the program each year.

<sup>50</sup> The Child First Doctrine: is "The child is our first priority. Not the needs of the family. Not the child's 'story.' Not the evidence. Not the needs of the courts. Not the needs of the police, child protection, attorneys, etc. **The child is our first priority.**" Ann Ahlquist & Bob Ryan (1993). *Interviewing Children Reliably and Credibly: Investigative Interview Workbook*. Minneapolis, MN: CornerHouse Interagency Child Abuse Evaluation and Training Center.

Common to most protocols, including R.A.T.A.C.<sup>TM</sup>, is a multi-disciplinary team approach to the interview to reduce the frequency with which the child will be interviewed. Multi-disciplinary teams primarily consist of a prosecuting attorney, law enforcement investigator, child protection services investigator, a forensic interviewer, and a health care provider (medical and psychological professionals). Each member of the team is interested in different aspects of the single interview. For example, the child protection services worker may be interested in knowing whether the offender was living in the home of the child and, if so, will then need to find foster care placement for that child if the offender is not removed. The medical provider may be listening for any statement from the child that would warrant a physical examination or sexual assault examination. The psychological professional may determine that based on the disclosure, the child is in need of immediate therapeutic intervention for the child's best interests. Thus, each team member has a different perspective while observing the interview.

As its primary purpose, a forensic interview is conducted to address the immediate health and welfare of the child.<sup>51</sup> In this process, the interviewer will determine whether abuse or neglect happened; obtain information from the child; establish rapport between the interviewer and the child (to provide comfort and security to the child when disclosing difficult information); and use age appropriate questions that neither suggests information to the child nor offers leading questions that offer the answer to the child. Most trained professionals who conduct forensic interviews of children are governmental agents employed by the state, either as police officers, child protection service workers, or social workers. Although some forensic interviewers are employed by privately-owned organizations or child advocacy centers and would likely not be deemed a governmental agent for purposes of the first prong of *Crawford*,<sup>52</sup> these individuals are in the minority across the country.

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<sup>51</sup> For example, Minnesota law sets forth that upon receiving a complaint of child abuse, “[t]he agency responsible for assessing or investigating reports of child maltreatment has the authority to interview the child, the person or persons responsible for the child's care, the alleged perpetrator, and any other person with knowledge of the abuse or neglect for the purpose of gathering the facts, assessing safety and risk to the child, and formulating a plan.” Minn. Stat. §626.556(3)(d). In addressing the immediate health and welfare of the child, “[i]f the report alleges neglect, physical abuse, or sexual abuse by a parent, guardian, or individual functioning within the family unit as a person responsible for the child's care, the local welfare agency shall immediately conduct a family assessment or investigation as identified in clauses (1) to (4). In conducting a family assessment or investigation, the local welfare agency shall gather information on the existence of substance abuse and domestic violence and offer services for purposes of preventing future child maltreatment, safeguarding and enhancing the welfare of the abused or neglected minor, and supporting and preserving family life whenever possible. If the report alleges a violation of a criminal statute involving sexual abuse, physical abuse, or neglect or endangerment, under section 609.378, the local law enforcement agency and local welfare agency shall coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews.” §626.556(10)(a)(4). Michigan law sets forth, “In the course of its investigation, the department shall determine if the child is abused or neglected. The department shall cooperate with law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services in relation to preventing, identifying, and treating child abuse and neglect; shall provide, enlist, and coordinate the necessary services, directly or through the purchase of services from other agencies and professions; and shall take necessary action to prevent further abuses, to safeguard and enhance the child's welfare, and to preserve family life where possible. MCL § 722.628(2).

<sup>52</sup> See, e.g. *People v. Geno*, 683 N.W.2d 687 (Mich. Ct. App. 2004).

#### IV. COURTS ARE INACCURATELY ANALYZING *CRAWFORD* IN RELATION TO YOUNG WITNESSES

##### A. Forensic Interviews Have Been Negatively Impacted by Post-*Crawford* Courts

From the three core classifications outlined in the *Crawford* opinion as to what might constitute a testimonial statement, the following two-prong test is best in line with the intent of the *Crawford* decision,<sup>53</sup> as well as for vulnerable victims, such as children, to determine whether an out-of-court hearsay statement of a non-testifying witness is testimonial:

- First, was a governmental agent involved in creating testimony or taking a formalized statement of a witness?
- Second, would an objective witness in the declarant's position reasonably believe that the statement would later be used in trial?

Courts have primarily focused on the first prong of the analysis and have spent little time addressing the second prong as to whether young children can reasonably understand that their statements might be used in trial. However, since mid-2005, courts began to assess the second prong in relation to young children. In looking at the three classifications outlined by the *Crawford* court, a forensic interview of a young child<sup>54</sup> should never be deemed testimonial.

The “primary purpose” test discussed in *Davis/Hammon* focuses on the objective purpose of the law enforcement investigator and appears to contradict the objective person test which focuses on what is reasonable to the declarant. Much discussion was held in the prosecution, legal and academic communities immediately following the *Davis/Hammon* decision on the survival of the objective person test. Although *Crawford*, *Davis* and *Hammon* are open to wide interpretation, what is clear is that arguing the objective person test after *Davis/Hammon* is still viable.

As in *Crawford*, the *Davis/Hammon* Court continued to focus on “[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>55</sup> In spite of the “primary purpose” test focusing on the mind-set of the interrogator, the court noted Confrontation Clause issues are always focused on the declarant and not the interviewer. Nonetheless, when admitting the out-of-court statement of a child victim, the factors to understand are twofold: first, most child abuse victims do not immediately disclose the crime thus taking their initial disclosure out of the “primary purpose” scenarios set forth in *Davis/Hammon*; and second, children are never, under any circumstances, subjected to an interrogation as outlined in *Davis/Hammon*. Therefore, the “testimonial” guidelines set forth in *Davis/Hammon* should not apply in a child abuse case and should be clearly distinguished as such for the court to properly rule.

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<sup>53</sup> See, also, *State v. Staten*, 610 S.E.2d 823 (S.C. Ct. App. 2005).

<sup>54</sup> For purposes of this article, “young child” means a child age ten years old or under.

<sup>55</sup> 2006 U.S. LEXIS 4886, at \*19.

When analyzing a forensic interview within the core classifications outlined in *Crawford*, a forensic interview does not fall within any classification. **First**, a forensic interview of a young child is not ex parte in-court testimony or its functional equivalent such as an affidavit, a custodial examination prior testimony, or any similar pretrial statement that the child would reasonably expect to be used prosecutorially. Statements made during a forensic interview are not formalized to the extent of courtroom testimony. They are also not the equivalent of interrogation. Those formally trained in forensic interviewing, particularly the R.A.T.A.C.<sup>TM</sup> are taught to ask open ended questions and focused questions to allow the child to provide a statement in his or her own words. Black's Law Dictionary defines interrogation as "the formal or systematic questioning of a person; esp. intensive questioning by the police, usually of a person arrested for or suspected of committing a crime."<sup>56</sup> The definition further provides, "The Supreme Court has held that ... interrogation includes not only express questioning but also words or actions that the police should know are reasonably likely to elicit an incriminating statement." Children who are asked open-ended questions during a forensic interview are not interrogated for purposes of obtaining incriminating statements. These children are alleged to have been abused and are not suspected of any criminal wrongdoing. No court should equate a forensic interview conducted by a police officer to that of interrogating a suspect.

**Second**, a forensic interview of a young child is not formalized testimonial material such as affidavits, depositions, prior testimony, or confessions as outlined in *Crawford*.<sup>57</sup> Again, when looking to the purpose of these formalized pre-trial statements, it is clearly understood by an objective declarant that the statements may later be used in court. Many forensic interviews are now conducted at Child Advocacy Centers (CAC) throughout the country. The National Children's Advocacy Center, the first CAC created in the country, defines a CAC model as, "a child-focused, facility-based program in which representatives from many disciplines -- law enforcement, child protection, prosecution, mental health, medical and victim advocacy - work together, conducting joint forensic interviews and making team decisions about the investigation, treatment, management and prosecution of child abuse cases. CACs are community-based programs designed to meet the unique needs of a community, so no two CACs look exactly alike. They share a core philosophy that child abuse is a multifaceted community problem and no single agency, individual or discipline has the necessary knowledge, skills or resources to serve the needs of all children and their families. They also share a belief that the combined wisdom and professional knowledge of professionals of different disciplines will result in a more complete understanding of case issues and the most effective, child and family-focused system response. The primary goal of all CACs is to ensure that children are not further victimized by the intervention systems designed to protect them."<sup>58</sup>

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<sup>56</sup> Black's Law Dictionary 838 (8<sup>th</sup> ed. 1999).

<sup>57</sup> *Crawford*, 514 U.S. at 52.

<sup>58</sup> The National Children's Advocacy Center Web Site is available at [http://www.nationalcac.org/professionals/model/cac\\_model.html](http://www.nationalcac.org/professionals/model/cac_model.html).

When a child, particularly under the age of ten, is at a child-friendly CAC<sup>59</sup> or in a child-friendly interview room at another location<sup>60</sup>, an objective child would not be able to independently process that their statements might later be used in court.

**Third**, a forensic interview of a child does not involve interrogation; it involves interviewing the child in a non-suggestive manner. An interrogation by any definition involves a systematic and accusatory method of questioning an individual, most often a suspect. The interrogator primarily dominates the session through structured questioning. An interview, on the other hand, involves a non-accusatory meeting for information gathering by two people. The interviewee primarily speaks during this session with the interviewer using open-ended questioning to avoid any issues with suggestible questions. As such, the “primary purpose” test outlined in *Davis/Hammon* will not apply to forensic interviews since children are “interviewed” and not “interrogated.”<sup>61</sup>

**Fourth**, a forensic interview of a young child does not contain statements that were made under circumstances which would lead an objective witness in the declarant’s position to reasonably believe that the statement would be available for use at a later trial. As discussed later, children do not understand the court process and, particularly under the age of ten, will not have the cognitive ability or maturity to independently comprehend that their statement may later be used in court. Nonetheless, many courts have focused solely on whether the interviewer is a governmental agent and, if so, have declared the interview testimonial solely on that factor. This limited analysis does not fully address all the formulations laid out by the *Crawford* court.

**B. Appellate Courts Across the Country are Issuing Conflicting Rulings as to whether Child Statements are Testimonial or Non-Testimonial.**

**1. Child Abuse Cases Ruling that Child Statements are Testimonial**

The cases cited next involve child abuse prosecutions that proceeded to trial without the child’s testimony. These cases are outlined to demonstrate how courts are addressing the governmental agent factor yet are failing to properly address the reasonable expectation factor for the child. These cases validate how courtroom doors are being shut to young children who are unable to testify in court due to trauma or youthfulness, and that statements made by our youngest members of society are being discounted while offenders are able to evade criminal conviction for choosing our youngest children to victimize.

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<sup>59</sup> “At the Children's Advocacy Center, the various members of the child protection, law enforcement, prosecution, victim advocacy, medical and mental health communities were able to provide children and their families comprehensive services within a child-friendly environment designed to meet the child's needs. Prior to this effort, investigation and intervention into these serious cases of child maltreatment had been sporadic and without a common sense of duty and purpose.” See, National Children’s Alliance Web site at <http://www.nca-online.org>.

<sup>60</sup> Many police stations and school settings have created child-friendly rooms where children can be asked about alleged abuse or neglect. This is done in order to create a non-threatening and supportive environment for the child.

<sup>61</sup> See the American Prosecutors Research Institute’s *Finding Words: Interviewing Children and Preparing for Court* training program.



In *State v. Hooper*,<sup>62</sup> statements made by a six-year-old victim to a nurse were found to be testimonial. The child was interviewed at a child advocacy center by a nurse practitioner. The Idaho Court of Appeals applied the *Davis/Hammon* primary purpose test to determine whether the child's forensic interview was properly admitted in court since the child did not testify due to fear. The application of the "primary purpose" test was inaccurate since that test applies to law enforcement interrogations and this particular interview involved a nurse practitioner. The Court found that the child's interview was testimonial and, therefore, improperly admitted at trial. The Court provided the following reasoning:

Turning to the case before us, it cannot be seriously disputed that the interview of A.H. by the STAR nurse bears far more similarity to the police interviews in *Crawford* and *Hammon* than to the 911 call at issue in *Davis*. A.H. gave her statement several hours after the alleged criminal event; it was not a plea for assistance in the face of an ongoing emergency, but a recitation of events that occurred earlier that day. A.H. was separated from the perpetrator in a safe, controlled environment and responded calmly to the questions. Although it would not have been a crime for A.H. to lie to the nurse, and the interview therefore lacked one of the formality components present in *Hammon* and *Crawford*, A.H.'s interview did have many trappings of formality, including structured questioning in a closed environment, supervision by a police officer, and recordation by videotape. Perhaps of greatest importance, the statement that A.H. gave was precisely the kind of statement that a witness would give on direct examination at trial. At the outset, the interviewer asked several preliminary questions to ensure that A.H. knew the difference between the truth and a lie, and asked A.H. to correct the interviewer if she said something inaccurate. These questions very much resemble the initial questions a prosecutor would ask when examining a child witness on the stand, and the substantive questioning that followed elicited the details of the crime and the identity of the perpetrator. A.H.'s statements in the interview "aligned perfectly with their courtroom analogues."<sup>63</sup>

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In the present case, it is clear that the interviewer acted in concert with or at the behest of the police. The interviewing nurse described herself as a 'forensic interviewer and sexual assault nurse examiner.' Police directed the victim's mother to take her to the STAR Center, and an officer watched the interview from another room. Toward the end of the interview, the nurse inquired of the officer whether all the questions that the officer desired had been asked, and then returned to the interview room with several additional queries, apparently at the officer's instruction. In addition, the nurse testified that the purpose of the questioning was in preparation for trial and that she knew the interview would be used in a subsequent criminal prosecution. There is no evidence that the interview had a diagnostic, therapeutic or medical purpose. The conclusion is inescapable

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<sup>62</sup> No. 31025, 2006 Ida. App. LEXIS 83 (Idaho Ct. App. 2006).

<sup>63</sup> *Hooper*, 2006 Ida. App. LEXIS at 11-13.

that the nurse was acting in tandem with law enforcement officers to gain evidence of past events potentially to be used in a later criminal prosecution.’<sup>64</sup>

\* \* \*

We conclude, however, that while these courts' analyses may have represented a reasonable interpretation of *Crawford*, they have been discredited by *Davis*, which focuses not at all on the expectations of the declarant but on the content of the statement, the circumstances under which it was made, and the interrogator's purpose in asking questions.<sup>65</sup>

The court's analysis in *Hooper* is interesting as it takes the law enforcement interrogation limited imposed by *Davis/Hammon* to an exaggerated level and labeled the nurse practitioner as acting in concert with the police. Although it is troubling that the nurse practitioner had no diagnostic, therapeutic or medical duties during this interview, thus making the nurse's testimony fall outside the scope of the medical hearsay exception, the court went to great length's to insure that the six-year-old child's statements would be barred from the courtroom.

*Rangel v. Texas*<sup>66</sup> addressed forensic interview statements made by a four-year-old victim who was unable to testify due to trauma. The prosecutor moved to admit the videotaped forensic interview of the child and the defendant was convicted. On appeal, the court found the interview to be testimonial.

Regardless of whether the four-year-old child may or may not have perceived when she made the statements that they could be used against appellant as evidence in a criminal case, the statute itself clearly contemplates that a child's statement admitted under article 38.071 will function as *testimony* in a criminal case. \*\*\* Thus, regardless of what C.R. thought her statements would be used for, they were clearly admitted at trial to function as testimony against appellant. Moreover, the structured, formalized questioning of C.R. by the investigator, whether sworn or unsworn, is more akin to the types of *ex parte* examination discussed and condemned in *Crawford* than a "casual remark to an acquaintance" or even to initial statements made to a police officer responding to a call. Furthermore, during the interview Cleveland stated that she was asking C.R. questions to make sure that "it" did not happen again. Regardless of whether C.R. understood the full extent to which her answers could be used, i.e., as testimony in a criminal prosecution of appellant, we believe, either under a subjective standard or an objective standard, that a four-year-old child would be able to perceive this as meaning that her words would be used to establish or prove some fact--i.e., that he sexually assaulted her--and that the establishment of that fact was necessary so

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<sup>64</sup> *Hooper*, 2006 Ida. App. LEXIS at 14-15.

<sup>65</sup> *Hooper*, 2006 Ida. App. LEXIS at 18.

<sup>66</sup> *Hooper*, 199 S.W.3d 523 (Tex. Crim. App. 2006).

that a person in authority, whether the investigator or someone else, would make appellant stop.<sup>67</sup>

The court addressed what would be understood by a four-year-old child and, without any supporting evidence or research, concluded that a four-year-old would understand that her statement would be used to prove a fact and give a person of authority the ability to make the defendant stop. It is clear that court imposed its own adult cognitive abilities in place of what an objective four-year-old child, or this four-year-old child, would reasonably understand.

In *North Dakota v. Blue*,<sup>68</sup> a four-year-old child was interviewed at a Child Advocacy Center while a police officer watched the interview from a television in a different room. Although the child had been present at a preliminary examination where she sat on her mother's lap and answered certain questions, the child was unavailable to testify at trial and the videotaped interview was admitted in to evidence. The court determined that the statements made by the child at the interview were testimonial for the reason that her statements were made "with police involvement. Statements made to non-government questioners acting in concert with or as an agent of the government are likely testimonial statements under *Crawford*."<sup>69</sup> The court failed to consider what the child understood during the interview about her statements potentially being needed for court.

In *D.G.B. v. State*,<sup>70</sup> a juvenile defendant was charged with molesting a six-year-old victim. At trial, the forensic interview of the victim was introduced as the victim did not testify due to trauma. The Indiana Court of Appeals determined that the forensic interview was testimonial under *Crawford* since the interview was conducted by a police officer attempting to gather evidence of a crime. The court failed to conduct an analysis of whether the six year old child understood that the statements made at the forensic interview might later be used in court.

In *State v. Mack*,<sup>71</sup> the trial court ruled that a social worker, who took over a forensic interview started by a police officer, was a governmental agent and was serving as a proxy for the police when finishing the interview of the three-year-old witness. In a pre-trial ruling several days after the issuance of the *Crawford* decision, the trial court found that the child was incompetent to testify. The court further found that the social worker was eliciting statements from the child so that the police could videotape the interview for the investigation. As a result, the forensic interview was declared testimonial and was not admissible due to the child's incompetency to testify. On appeal, the prosecution asked the court to look at the child's intent in making

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<sup>67</sup> 199 S.W.3d 523 .

<sup>68</sup> 717 N.W.2d 558 (N.D. 2006).

<sup>69</sup> 2006 N.D. LEXIS 143 at \*13-14.

<sup>70</sup> 2005 Ind. App. LEXIS 1584 (Ind. Ct. App. 2005).

<sup>71</sup> 101 P.3d 349 (Or. 2004). See also, *People v. T.T.* (In re T.T.), 351 Ill. App. 3d 976, 815 N.E.2d 789 (Ill. App. Ct. 2004) (statements made by the child to a Illinois Department of Children and Family Services investigator and police officer were deemed testimonial due to their status as governmental agents).

statements during the forensic interview. Unfortunately, the child's intent in making statements is not the factor outlined in *Crawford*; rather, whether the child could reasonably expect her statements to later be used in court is the proper analysis. Thus, the Oregon Court of Appeals failed to address whether the three-year-old child understood that the statements might later be utilized prosecutorially.

The employment status of a police officer was addressed in *People v. R.F.*<sup>72</sup> This case involved a three-year-old victim who was interviewed by a police officer subsequent to making disclosures of sexual abuse to her mom and grandmother. At trial, all statements made by the child were admitted without the child testifying. These statements were admitted before the decision in *Crawford* was announced. The defendant was convicted and on appeal he raised a *Crawford* violation. Although the court properly ruled that statements made to family were non-testimonial, the court found that the forensic interview was testimonial because the officer "was acting in an investigative capacity for the purposes of producing evidence in anticipation of a criminal prosecution when he questioned [the child]."<sup>73</sup> The Illinois Court of Appeals noted the language regarding the reasonable expectations of the declarant when making out-of-court statements, yet failed to analyze what an objective witness in the three-year-old victim's position would reasonably understand when making the statement. The defendant's conviction was upheld in spite of the violation which was deemed harmless error in light of other evidence of his guilt.

*T.P. v. State*<sup>74</sup> addressed Alabama's Tender Years statute which provides for hearsay statements of children under age twelve to be admitted at trial if the child testifies or if the child is found to be unavailable. The eight-year-old child victim was deemed unavailable to testify due to a finding of emotional trauma by the court. Statements by the child during a forensic interview conducted by a police investigator and witnessed by a social services worker were admitted at trial. The defendant was convicted and while his appeal was pending, the *Crawford* decision was issued. The Alabama Court of Appeals found that the forensic interview was intended as an investigative tool for a potential criminal prosecution, thus being similar to a police interrogation, and therefore fell within the definition of "testimonial." Again, the court did not address whether the eight-year-old child reasonably expected that his statement could later be used in court.

In *People ex rel. R.A.S.*,<sup>75</sup> a juvenile defendant was convicted of molesting a four-year-old child. The child disclosed the abuse to his mother and then during a videotaped forensic interview with a trained police officer. At trial, the child was available to testify at a competency hearing, but the hearing was not held due to a stipulation between the attorneys that the child was too young to be competent to testify. As a result, the court permitted the child's statements to his mother to be admitted, as well as the videotaped forensic interview. *Crawford* was decided while this case

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<sup>72</sup> 825 N.E.2d 287 (Ill. Ct. App. 2005)

<sup>73</sup> *R.F.*, 825 N.E.2d at 295.

<sup>74</sup> 911 So. 2d 1117 (Ala. Crim. App. 2004)

<sup>75</sup> 111 P.3d 487 (Colo. Ct. App. 2004)

was pending on appeal. The Colorado Court of Appeals applied *Crawford* and found that the statements by the child to the police officer were testimonial and investigative in nature. The court did not address whether the child victim could reasonably expect her statements to later be used in court and the court was not asked to make a finding of incompetency due to the stipulation. Although the juvenile defendant stipulated that the child was incompetent to testify, the defendant did not waive his confrontation rights within that stipulation. The court found that the defendant only waived unavailability of the child to testify and did not waive the right to confront the child. The hearsay statements to the mother were not addressed on appeal. The conviction in this case was reversed and the case was remanded for a new trial in light of *Crawford*.

In addressing interviewers who are employed for privately funded child welfare centers, the court in *People v. Geno*<sup>76</sup> held that the director of a non-governmental Children's Assessment Center was not a governmental employee. Although Child Protective Services, a state agency, arranged for the interview, this did not impact on the court's decision. The court held that "the child's answer to the question of whether she had an 'owie' was not a statement in the nature of 'ex parte in-court testimony or its functional equivalent'."<sup>77</sup>

One case that addressed whether a young child could reasonably understand that statements made in the forensic interview would be used in trial is *People v. Vigil*.<sup>78</sup> The defendant was charged and convicted of having sexually assaulted the seven-year-old son of a co-worker in the co-worker's home. At trial, the child's father testified that he witnessed the defendant leaning over his child and both were partially undressed. When the defendant fled the home, the child was frightened and confused but disclosed anal penetration. The child also disclosed to his father's friend that his "butt hurt." A police officer completed a videotaped interview with the child. Portions of the videotaped interview were played at trial after the child was found incompetent to testify. The Colorado Court of Appeals overturned the conviction and ruled that the videotaped statement by the child was testimonial and violated *Crawford*.

We conclude that the videotaped statement given by the child to the police officer in this case was "testimonial" under the *Crawford* formulations of that concept. In so concluding, we reject the People's argument that the statement could not be considered testimonial because it was not made during the course of police interrogation and because a seven-year-old child would not reasonably expect his statements to be used prosecutorially. \*\*\* The police officer who conducted the interview had had extensive training in the particular interrogation techniques required for interviewing children. At the outset of the interview, she told the child she was a police officer, and, after ascertaining that the child knew the difference between being truthful and lying, she told him he needed to tell the truth. Thus, the absence of an oath,

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<sup>76</sup> 683 N.W.2d 687 (Mich. 2004)

<sup>77</sup> *Geno*, 683 N.W.2d at 692.

<sup>78</sup> 104 P.3d 258 (Colo. 2004); *rev'd in part* 127 P.3d 916 (Colo. Sup. Ct. 2006).

which in any event is not a requirement under *Crawford* for police interrogations, did not preclude the child's statements from being testimonial. \*\*\* Nor can the statements be characterized as non-testimonial on the basis that a seven-year-old child would not reasonably expect them to be used prosecutorially. During the interview, the police officer asked the child what should happen to defendant, and the child replied that defendant should go to jail. The officer then told the child that he would need to talk to "a friend" of hers who worked for the district attorney and who was going to try to put defendant "in jail for a long long time." This discussion, together with the interviewer's emphasis at the outset regarding the need to be truthful, would indicate to an objective person in the child's position that the statements were intended for use at a later proceeding that would lead to punishment of defendant.<sup>79</sup>

Based on the nature of the interview and statements made the seven-year-old child, it is understandable how the court would deem the statement to be testimonial. The court analyzed what a child of that age would understand and, based on what the detective told the child, the child understood that his statements might be used in court or, at a minimum, to put the offender in jail. However, the Colorado Supreme Court reversed the decision of the Court of Appeals in regard to the child's statements to the emergency room physician. The Court held that statements made by the same child to the emergency room physician were non-testimonial, and outlined a reasonable child standard in its reasoning; however, they affirmed the lower court's ruling that the statement by the child during the forensic interview was testimonial. What is important to note about the forensic interview in *Vigil* is that many of the tactics and statements made by the trained police officer are not recommended, especially during a RATAC interview.

In *Snowden v. State*,<sup>80</sup> the Maryland Supreme Court ruled that forensic interviews of children ages eight and ten, conducted by a child protective services worker, were testimonial and would require testimony by the children at trial in order to admit the videotaped forensic interview. In its opinion, the court found that the CPS worker was a governmental agent. Although the victims were young, the court found that they were aware that their statements were being taken because the police were involved. The Maryland Supreme Court imposed an objective ordinary person standard on these child victims, pointed out that the interviews were conducted at a county-owned facility, and that the purpose of the CPS worker conducting the interview was to gather evidence for prosecution. However, the court did acknowledge that some children may not understand the purpose of a forensic interview and said, "Although we recognize that there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants." The Court came to that conclusion regarding children without any supporting research or evidence from these particular victims, or objective children in their position.

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<sup>79</sup> *Vigil*, 104 P. 3d 258, 262-263.

<sup>80</sup> 867 A.2d 314 (Md. 2005)

Lastly, the Minnesota Court of Appeals applied the *Davis/Hammon* “primary purpose” test to statements made by a seven-year-old victim to a nurse practitioner. In *State v. Krasky*,<sup>81</sup> the Minnesota Court of Appeals reversed its prior ruling where the court held, “although the MCRC examination may have been arranged by Detective Manuel and a child-protection worker, there is no indication that T.L.K. thought that her statements might be used in a later trial.”<sup>82</sup> On rehearing, the court reversed itself and found that the child’s statement were testimonial based on the “primary purpose” of the interview and specifically refused to address what a child would understand. This was an improper application of the *Davis/Hammon* rule.

The decisions discussed in this section demonstrate the difficulty of trial and appellate courts in applying an undefined and unworkable test from *Crawford*, *Davis* and *Hammon*. Thus, child victims who are too traumatized or too young to testify are being denied a fundamental right as a victim to be heard in court.

## 2. Appellate Courts that Addressed the Objective Declarant Prong of *Crawford* in Relation to Children: The Proper and Improper Applications of the Objective Reasonable Declarant

Approximately one year after the issuance of *Crawford*, some courts began to apply the new rule of *Crawford* in a manner that reflected what children understand about the nature of their statements. In doing so, many of these courts acknowledged that young children, particularly under the age of ten, do not think like an adult or cognitively process information like an adult. This analysis is difficult for many judges, like child abuse cases in general, due to lack of training on child witnesses and how to handle cases involving young victims.<sup>83</sup> Therefore, when addressing the objective reasonable person standard of *Crawford*, the question becomes: What is objectively reasonable for a person of the age of the child?

The first post-*Crawford* case to address the abilities of a child witness came in *State v. Dezee*.<sup>84</sup> The Washington Court of Appeals held that nothing in the record supported the conclusion that the nine-year-old child reasonably believed the statements to her mother could or would be available for use in a trial.

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<sup>81</sup> 696 N.W.2d 816 (Minn. Ct. App. 2005).

<sup>82</sup> *Krasky*, 696 N.W. 2d at 820.

<sup>83</sup> For further discussion, see Victor I. Vieth, *Unto the Third Generation: A Call to End Child Abuse in the United States Within 120 Years (revised and expanded)*, 25 HAMLINE JOURNAL OF PUBLIC LAW & POLICY (forthcoming 2007) where he cites “A recent survey of 2,240 judges found that barely 50% of them had received any child welfare training before hearing child dependency and neglect proceedings. *View from the Bench: Obstacles to Safety & Permanency for Children in Foster Care* (July 2004) (this survey was conducted by the Children & Family Research Center, School of Social Work, University of Illinois, Urbana-Champaign and is available on line at [www.fosteringresults.org](http://www.fosteringresults.org).”

<sup>84</sup> No. 51521-7-I, 2005 Wash. App. LEXIS 104 (Wash. Ct. App. 2005).

The next decision, in May 2005, showed the Ohio Court of Appeal's acknowledgement of what a reasonable child understands about court. *In re D.L.*<sup>85</sup> involved a juvenile defendant who was found delinquent for engaging in sexual conduct with his three-year-old cousin. The victim was found incompetent to testify at trial. The social worker who interviewed the child testified that the victim gave great detail similar to the disclosure that was given to her mother. The victim was taken to the hospital and given a physical exam. The exam revealed nothing. However, the pediatric nurse practitioner concluded that abuse was probable, based on the victim's description of events. The victim's statements to the practitioner were held non-testimonial and properly admitted under the medical history hearsay exception despite the ruling that the victim was not competent to testify. There was no evidence to show that the nurse practitioner was working on behalf of, or in conjunction with, investigating police officers for the purpose of developing the case against the defendant. The nurse took statements from the victim to evaluate how likely it was that she had been abused and to determine what laboratory tests and medical treatment might be needed. The nurse further considered information from the victim's medical history to aid her in making her assessment and conducted a physical evaluation of the victim. There was no evidence that the victim was interviewed for the express purpose of developing her testimony for use at trial. The court went on to say "[o]ur review of the record shows no circumstances to indicate the victim, or a reasonable child of her age, would have believed her statements were for anything other than for medical treatment."<sup>86</sup> The court further held, "because an incompetency ruling is a declaration that the witness is incapable of understanding an oath, or liable to give an incoherent statement as to the subject and cannot properly communicate to the jury, it does not make for a conclusion that all out-of-court statements are per se inadmissible when a witness is declared incompetent. This may be particularly true in the case of young children. Simply because a child is deemed incompetent for purposes of testifying does not make the child's statements per se inadmissible."<sup>87</sup>

As previously discussed, the Maryland Supreme Court in *State v. Snowden*<sup>88</sup> addressed the forensic interview statements of two child victims of sexual abuse (ages 8 and 10). The children did not testify at trial, but the CPS worker who interviewed the children testified to the statements made during the interview.

Using these objective standards in the present case, it is clear that an ordinary person in the position of any of the declarants would have anticipated the sense that her statements to the sexual abuse investigator potentially would have been used to "prosecute" Snowden. The interview questions posed by Wakeel, and the responses elicited, were in every way the functional equivalent of the formal police questioning discussed in *Crawford* as a prime example of what may be considered testimonial. *Id.* at \_\_\_, 124 S. Ct. at 1364-65, 158 L. Ed. 2d 177.

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<sup>85</sup> 2005 Ohio 2320 (Ohio Ct. App. 2005).

<sup>86</sup> *In re D.L.*, 2005 Ohio 2320 at P20.

<sup>87</sup> *In re D.L.*, 2005 Ohio 2320 at P28.

<sup>88</sup> 867 A.2d 314 (Md. 2005).



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During Wakeel's interviews, each child also stated that she was aware of the purpose of the questioning, and through each of her answers indicated that she was aware of the illegal (or at least morally or ethically wrong) nature of the touching attributed to Snowden. This awareness of the prosecutorial purpose of the interviews not only satisfies any objective formulation of what is "testimonial," but, in our opinion, demonstrates that the children *actually* were aware that their statements had the potential to be used against Snowden in an effort to hold him accountable for his conduct.<sup>89</sup>

The court imposed an objective ordinary person standard on these child victims, pointed out that the interviews were conducted at a county-owned facility, and that the purpose of the CPS worker conducting the interview was to gather evidence for prosecution. The Court went on to hold:

We find that where an objective person in the position of the declarant would be aware that the statement-taker is an agent of the government, governmental involvement is a relevant, and indeed weighty, factor in determining whether any statements made would be deemed testimonial in nature.

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Although we recognize that there may be situations where a child may be so young or immature that he or she would be unable to understand the testimonial nature of his or her statements, we are unwilling to conclude that, as a matter of law, young children's statements cannot possess the same testimonial nature as those of other, more clearly competent declarants.<sup>90</sup>

The *Snowden* Court reached these conclusions based solely on the conduct and questions of the interviewer, and failed to address child development research or what a child would understand about the later use of her statement. This analysis is inaccurate when following the core classifications outlined in *Crawford*.

In *Lagunas v. State*,<sup>91</sup> a four-year-old child witnessed the defendant killing her mother. The child was unable to testify at trial; however, the court allowed the child's statements to be admitted. On appeal, the court held that the child's age and her emotional state were factors in determining that her statements to the officer were non-testimonial.

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<sup>89</sup> *Snowden*, 867 A2d at 325-26.

<sup>90</sup> *Snowden*, 867 A2d at 328-29.

<sup>91</sup> 187 S.W.3d 503 (Tex. Ct. App. 2005).

In September 2005, the Military Court of Criminal Appeals addressed the statements of a two-year-old child in *United States v. Coulter*.<sup>92</sup> The two year old child spontaneously disclosed to her parents that she had been touched by defendant. These statements were held non-testimonial because the statements to her parents were not the type of testimonial statements outlined in *Crawford*. Moreover, “[a]t the same time, the circumstances under which this two-year-old declarant made her statements would not lead an objective witness to reasonably believe that the statements would be available for use at a later trial. Two-year-old [victim] could no more appreciate the possible future uses of her statements than she could understand the significance of what she was communicating.”<sup>93</sup>

The Colorado Court of Appeals, in *People v. Sharp*,<sup>94</sup> held that a five-year-old child abuse victim could not appreciate the consequences of her statements during a forensic interview. In a well-reasoned decision that focused on the reasonable expectation prong, the court stated:

Defendant was convicted of sexually assaulting his five-year-old daughter. The mother testified that when the child returned from a visit with defendant, she reported that defendant had touched her inappropriately. At trial, the prosecution attempted to have the child testify, but after it became apparent she was too traumatized to testify, the trial court found her unavailable as a witness. At that time, portions of the child's videotaped interview were shown to the jury. The appellate court found that defendant was entitled to seek relief under the U.S. Supreme Court *Crawford* decision, and ruled that defendant's confrontation rights were not violated by introduction of the child's videotaped statement at trial. A private forensic interviewer questioned the child outside the presence of police and district attorneys, using casual, open-ended questions. The child did not make any statement indicating that she understood the consequences of her statements. In short, there was no indication in the record that the child was aware of the reason for her interview. An objective person in the child's position would not believe her statements would lead to punishment of defendant.

*State v. Blount*<sup>95</sup> analyzed the statements of a three-year-old victim who was sexually abused by her mother's boyfriend and informed four people of the assault (her grandmother, a friend, and two counselors). The child was unable to testify at trial, but the statements to the four people were admitted. On appeal, the statements to the two counselors were in issue and held to be non-testimonial.

We hold, considering the surrounding circumstances, that a reasonable child in the victim's position would have no reason to know or believe her statements would be used in a subsequent trial. The victim was referred to Meadows, then a

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<sup>92</sup> 62 M.J. 520 (N-M. Ct. Crim. App. 2005).

<sup>93</sup> *Coulter*, 62 M.J. at \*24.

<sup>94</sup> No.: 04CA0619, 2005 Colo. App. LEXIS 1761 (Colo. Ct. App. 2005).

<sup>95</sup> No. COA05-134, 2005 N.C. App. LEXIS 2606 (N.C. Ct. App. 2005).

counselor at a private, non-profit child counseling center, by Department of Social Services social worker Angela Beasley. Meadows testified that in her sessions the child is never encouraged to disclose abuse, but is given the opportunity to do so in an environment where she feels secure enough to speak freely. Meadows testified that not all children disclose any abuse. There is no evidence in the record that Meadows ever discussed the potential for any criminal consequences for defendant. There is no evidence that Meadows ever discussed with the victim any potential punishment for the defendant. Roberts is a therapist in Dare County. The victim was referred to Roberts for follow up counseling after her sessions with Meadows, and at the time of trial had participated in approximately forty sessions with Roberts. Roberts testified that she assured the victim that their conversations were confidential, and that Roberts could not disclose their conversations to anyone. There is no evidence in the record that the victim was made aware in any way that her statements could be used against defendant for prosecution, or that Roberts ever discussed any potential consequences to defendant. In fact, review of the entire record reveals no evidence that the victim was ever made to understand by anyone that defendant could face criminal trial and punishment as a result of what he had done to her. The victim was three or four years old when she made her first statements to Meadows and Roberts implicating defendant (the record does not include the child's date of birth, but she was five at the time of the trial, and first spoke with Meadows and Roberts some fourteen months previously). *It is "highly implausible" that a three or four year old would have reason to know, nor even understand, that her statements might be used in a later trial.* (emphasis added)<sup>96</sup>

In contrast, *Flores v. State*<sup>97</sup> addressed what a five-year-old witness understands for purposes of the reasonable expectation standard. The case proceeded to trial prior to announcement of the new rule of *Crawford*. The five-year-old victim (Zoraida) was abused by her step mother and ultimately died from blunt force trauma to the head. The biological daughter (Sylvia) of the defendant witnessed the attack and told her foster mom (Ms. Diaz). Sylvia was declared unavailable to testify due to trauma. Statements she made to a child abuse investigator Durgin and CPS Investigator Goodman were introduced at trial pursuant to a state hearsay statute that followed *Idaho v Wright*.<sup>98</sup> In addressing the three formulations of what might be deemed

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<sup>96</sup> *Blount*, 2005 N.C. App. LEXIS 2606 at \*11-13.

<sup>97</sup> 120 P.3d 1170 (Nev. 2005).

<sup>98</sup> NRS 51.385 tracks the Idaho v. Wright model:

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child or any act of physical abuse of the child is admissible in a criminal proceeding regarding that act of sexual conduct or physical abuse if:

(a) The court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b) The child testifies at the proceeding or is unavailable or unable to testify.

testimonial statements as outlined in *Crawford*, the court held that Sylvia's statements do not meet the first or second formulation. However, the court found that:

[G]iven Sylvia's age and relationship to Flores, it is unlikely that she intended to testify through the surrogates or that she "reasonably expected" that the statements would be used criminally against her mother. \*\*\* We conclude, however, that two of Sylvia's statements were "testimonial" under the third illustration, as they were statements that, under the circumstances of their making, "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Under the third illustration the Court impliedly establishes a "reasonable person" test for when a declarant has made a testimonial statement. Applying this third test, we conclude that the statements to Durgin and Godman were clearly testimonial under *Crawford* because both were either police operatives or were tasked with reporting instances of child abuse for prosecution. \*\*\* With regard to the child's statements to Ms. Diaz, we conclude that these statements, which were spontaneously made at home while Ms. Diaz was caring for the child, were not such that a reasonable person would anticipate their use for prosecutorial purposes.”

The Nevada Supreme Court incorrectly addressed the “reasonable person” standard from the duties and intentions of the police officer and the CPS Investigator. There was no analysis given from what the five-year-old witness understood in regard to how her statement might later be used. Although such an analysis might arguably be proper under the *Davis/Hammon* “primary purpose” rule, that decision had not been issued at the time.

*North Carolina v. Brigman*<sup>99</sup> explained that “[w]e cannot conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. Therefore, we hold [the child’s] statement to Dr. Conroy was not testimonial, and defendant's right to confrontation was not violated.”<sup>100</sup> Similarly, *Miller v. Fleming*<sup>101</sup> followed the reasoning from *Colorado v. Vigil* and found that an objective seven-year-old would not understand that statements made to a medical professional would later be used in court. Thus,

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2. In determining the trustworthiness of a statement, the court shall consider, without limitation, whether:

- (a) The statement was spontaneous;
- (b) The child was subjected to repetitive questioning;
- (c) The child had a motive to fabricate;
- (d) The child used terminology unexpected of a child of similar age; and
- (e) The child was in a stable mental state.

<sup>99</sup> 629 S.E.2d 307 (N.C. Ct. App. 2006).

<sup>100</sup> *Brigman*, 629 S.E.2d at 317.

<sup>101</sup> No. C04-1289P, 2006 U.S. Dist. LEXIS 17284 (W.D. Wash. 2006).

those statements were deemed non-testimonial. In *re A. J. A.*<sup>102</sup> similarly concluded that a reasonable 5-year-old would not expect her statements to a nurse to later be used in court.

*Kansas v. Henderson*<sup>103</sup> held that an interview of a three-year-old child abuse victim was testimonial for the reason that the interview was conducted by child protection agencies in conjunction with law enforcement officials. The child was unable to testify due to competency issues as a result of her age. The prosecution argued a subjective reasonable witness standard from the point of this particular child. The Kansas Court of Appeals refused to accept this argument and held, “The State seizes upon the “reasonably expect to be used prosecutorially” phrase and argues that as a 3-year-old, F.J.I. could not reasonably believe her statements would be used at trial. If we were to adopt this standard, we would decide a serious constitutional issue based on the subjective intent of the declarant or on a “reasonable child” standard. Neither choice is logical or provides the more certain result that *Crawford* seems to require or that was found lacking under *Roberts*.<sup>104</sup> The *Crawford* Court did not provide a subjective reasonable person standard; instead, the Court set forth an objective witness standard, to wit: What would be reasonable to an objective person in the declarant’s position? Because the Kansas Court of Appeals only addressed the child’s statements from a subjective standard, the court rejected that argument. The court did not, sua sponte, address the objective reasonable person test set forth in *Crawford* and, therefore, ruled that the statement by the three-year-old child was testimonial.

*Rangel v. State*,<sup>105</sup> inaccurately addressed the objective reasonable person prong in regard to a four-year-old victim. “[D]uring the interview [the interviewer] stated that she was asking C.R. questions to make sure that ‘it’ did not happen again. Regardless of whether C.R. understood the full extent to which her answers could be used, i.e., as testimony in a criminal prosecution of appellant, we believe, either under a subjective standard or an objective standard, that a four-year-old child would be able to perceive this as meaning that her words would be used to establish or prove some fact--i.e., that he sexually assaulted her--and that the establishment of that fact was necessary so that a person in authority, whether the investigator or someone else, would make appellant stop.” Again, the Texas Court of Appeals determined that the four-year-old appreciated the nature of her statements without the benefit of research validating what a four-year-old understands about court, or what this particular child understood at the time of her statement.

As previously discussed, the decision of *People v. Vigil*<sup>106</sup> accurately outlines the position of a child when giving statements of abuse and acknowledges that a reasonable child standard is appropriate. The Colorado Supreme Court held in *Vigil* that “(1) the circumstances under which the child made statements did not constitute the functional equivalent of police interrogation and

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<sup>102</sup> No. A06-479, 2006 Minn. App. Unpub. LEXIS 988 (Minn. Ct. App. 2006).

<sup>103</sup> 129 P.3d 646 (Kan. Ct. App. 2006).

<sup>104</sup> *Henderson*, 129 P.3d at 651.

<sup>105</sup> 199 S.W.3d 523 (Tex. Ct. App. 2006).

<sup>106</sup> 127 P.3d 916 (Colo. 2006).

(2) an objectively reasonable child in the declarant's position would not have believed that his statements to the doctor or his statements to his father and his father's friend would be available for use at a later trial.” In determining that statements of the seven-year-old child to a doctor were non-testimonial, the court provided the following reasoning:

As the doctor testified at trial, his purpose in questioning the child was to determine whether the child would "say something that could help [the medical personnel] understand what the potential injuries were." The child's responses helped the doctor develop his opinion regarding whether a sexual assault had occurred and how best to treat the child. Thus, rather than being an agent of the police, the doctor's job involved identifying and treating sexual abuse. The fact that the doctor was a member of a child protection team does not, in and of itself, make him a government official absent a more direct and controlling police presence, such as the presence demonstrated in *Mack*, 337 Ore. 586, 101 P.3d 349 (Or. 2004), and *Snowden*, 385 Md. 64, 867 A.2d 314 (Md. 2005).

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We hold that the "objective witness" language in *Crawford* refers to an objectively reasonable person in the declarant's position. Applying this test to the instant case, we determine that an objectively reasonable person in the declarant's position would not have believed that his statements to the doctor would be available for use at a later trial.

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[A]n objective seven-year-old child would reasonably be interested in feeling better and would intend his statements to describe the source of his pain and his symptoms. In addition, an objectively reasonable seven-year-old child would expect that a doctor would use his statements to make him feel better and to formulate a medical diagnosis. He would not foresee the statements being used in a later trial. Thus, from the perspective of an objective witness in the child's position, it would be reasonable to assume that this examination was only for the purpose of medical diagnosis, and not related to the criminal prosecution. No police officer was present at the time of the examination, nor was the examination conducted at the police department. The child, the doctor, and the child's mother were present in the examination room.

*Commonwealth v. DeOliveira*<sup>107</sup> involved a six-year-old victim who informed a social worker about sexual abuse. The child was taken to the emergency room by police officers where she repeated her statements to the physician. The child was unavailable to testify at trial; however, the physician testified to statements made by the child during the examination and stated that he works independent from the police and examined the child for injury and to determine appropriate medical care. To assist the Massachusetts Supreme Court, this author filed an amicus brief addressing the child development research and what children understand about court.<sup>108</sup> The Massachusetts Supreme Court held that the child's statement was not ‘testimonial per se’.

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<sup>107</sup> 849 N.E.2d 218 (Mass. 2006).

<sup>108</sup> See, *infra*, Section V.

Police presence at a hospital cannot turn questioning of a patient by a physician during a medical examination into interrogation by law enforcement. We conclude that Patricia's statements to the doctor are not testimonial per se. That is, however, not the end of the analysis. Our Gonsalves decision also requires a careful assessment of all the circumstances in which a statement is made and an objective inquiry into "whether a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting a crime." *Id.* at 12-13. Logic informs that a six year old child can have little or no comprehension of a criminal prosecution in which the child's words might be introduced as evidence against another person in a court of law.<sup>109</sup>

In addressing the statement from the child's perspective, the court further held, "We have no difficulty concluding that, considering the circumstances, a reasonable person in Patricia's position, and armed with her knowledge, could not have anticipated that her statements might be used in a prosecution against the defendant. On this record, there is nothing to indicate that Patricia even recognized the criminality of the defendant's sexual contacts with her."<sup>110</sup>

Many of the courts listed above properly applied the factors outline in *Crawford* to determine whether the out-of-court statements by each child would be testimonial or not. However, the Maryland, Nevada and Texas courts failed to conduct a full or accurate analysis into the reasonable person standard as it relates to child forensic interviews and ended with a nonsensical and tragic result for those child victims. When courts begin to recognize that the objective reasonable person standard is not an adult standard, and that the court can take into account the cognitive and mental abilities of the child, that will result in turning the tide of inaccurate decisions from the bench that is harming child victims and witnesses. Understanding the child development research listed in the next Section will assist in making this difficult determination under *Crawford*..

#### V. THE OBJECTIVE REASONABLE PERSON STANDARD OF *CRAWFORD*: CHILDREN UNDER THE AGE OF TEN DO NOT UNDERSTAND COURT OR THE CRIMINAL JUSTICE PROCESS WHEN MAKING STATEMENTS REGARDING ABUSE

The *Crawford* factor that has been least addressed by courts in determining whether a statement is testimonial is: Would the declarant reasonably expect the statement to be used prosecutorially? In essence, does a child understand that during a forensic interview, the statements he or she makes might later be used in a criminal prosecution? Research has shown that young children do not understand what "court" is or how the criminal justice system operates and, therefore, are unable to understand that statements made in a forensic interview could be used in that forum. "Testifying is anxiety-producing for most adult witnesses. Adults, however, are sufficiently knowledgeable about the legal system to place their testimony in

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<sup>109</sup> *DeOliveira*, 849 N.E.2d at 225.

<sup>110</sup> *DeOliveira*, 849 N.E.2d at 226.

context. In general terms, adults understand what happens in court and what is expected of them. This knowledge helps adults manage the stress of testifying. By contrast, many children have little idea of what to expect in court. Some young children believe that they will go to jail if they give the ‘wrong answer,’ or that the defendant will yell at them.”<sup>111</sup> Below are six of the foremost studies regarding children’s understanding of court. These studies are important when addressing what a declarant understands when making accusatory statements to governmental agents.

1989 Saywitz Study: “Children’s Conceptions of the Legal System”

Dr. Karen Saywitz published a study in 1989 that focused on developmental differences in children’s understanding of the legal system and what contributes to that understanding.<sup>112</sup> Children ages four to fourteen were divided into age groups.<sup>113</sup> Half of the children were actively involved in court cases. The study focused on eight court-related concepts: “court,” “jury,” “judge,” “witness,” “lawyer,” “bailiff,” “court clerk,” and “court reporter.” All the children were asked questions and shown illustrations of these eight concepts and asked to tell what they knew about the concept. The terms “bailiff,” “court clerk” and “court reporter” were removed from the final results as the children overall had a poor understanding of those concepts. Surprisingly, children with more actual court experience demonstrated less accurate and less complete knowledge than children with no court experience. The researchers surmised this could be for two reasons. First, children who were involved in court cases may have emotional difficulties that interfere with cognitive abilities because they were from dysfunctional families; and second, actual court experience for children may be confusing and chaotic, thus making accurate knowledge of the system more difficult. The chart below demonstrates the percentage of children in each age group that showed accurate understanding of each of the eight concepts:

Concept	Age Group 4-7 years	Age Group 8-11 years	Age Group 12-14 years
<b>Court</b>	0.06% accurate	74% accurate	100% accurate
<b>Jury</b>	0% accurate	21% accurate	73% accurate
<b>Judge</b>	0.06% accurate	93% accurate	91% accurate
<b>Witness</b>	0.11% accurate	86% accurate	100% accurate
<b>Lawyer</b>	0% accurate	93% accurate	100% accurate

<sup>111</sup> John E.B. Myers, Karen J. Saywitz, Gail S. Goodman, *Symposium: Child Abuse: Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 23 PAC.I L. J. 3 (1996).

<sup>112</sup> Karen Saywitz, CHILDREN’S CONCEPTIONS OF THE LEGAL SYSTEM: COURT IS A PLACE TO PLAY BASKETBALL, PERSPECTIVES ON CHILDREN’S TESTIMONY, 131-157 (S.J. Ceci, D.F. Ross & M.P. Toglia eds., 1989).

<sup>113</sup> Group One (18 children age four to seven), Group Two (19 children age eight to eleven) and Group Three (11 children age twelve to fourteen). The children were also divided into High-Legal-Experience Group (if they were actively involved in a court case by being a victim of abuse or being involved in a custody dispute) or Low-Legal-Experience Group who had not been involved in a court case.



<b>Bailiff</b>	0.06% accurate	0% accurate	0.09% accurate
<b>Court Clerk</b>	0% accurate	0% accurate	0.18% accurate
<b>Court Reporter</b>	0% accurate	50% accurate	64% accurate

Children between the ages of eight and eleven begin to have a more accurate understanding of the court system and the primary people involved (jury, judge, witness and lawyer). However, children in the younger age group have little to no understanding of the court system's players much less the actual processes contemplated at the time of a forensic interview. Therefore, under the formulation set forth in *Crawford*, children below the age of ten could not reasonably expect that statements made during a forensic interview could later be used prosecutorially.

Additional concepts were tested in this study that further demonstrate when children understand court-related concepts. First, all children were asked: "What makes a jury/judge believe a witness?" The children in the older age group were able to identify factors used by judges and juries to determine credibility of witnesses, whereas the four- to seven-year-old group assumed witnesses always tell the truth and are believed. Whether the children were in the experienced or non-experienced court group did not affect this result. Second, all children were asked: "How do they [judge/jury] decide who wins the case in court?" The majority of eight- to fourteen-year-olds were inaccurate in their overall understanding. They generally believed that judge and jury decision-making are dependent on each other. Some children in this age group believed that the judge and jury discuss the case together and that the judge can change the jury's verdict. Only three children (in the 12-14 age group) understood that the judge and jury were independent from each other. Third, all children were asked the following questions: "What happens when people tell the truth in court? What happens when people tell a lie in court? Why is it important that people tell the truth in court?" Here, awareness was significantly different across age groups, but not across levels of court experience. A majority of the four- to seven-year-olds could not demonstrate any awareness of the court processes of gathering and determining the truth of evidence. Many of these children believed that the court's goal was to "punish the criminal or give the child to one of his parents," rather than understanding the actual goals of collecting, presenting, and evaluating evidence. Further, these children held the naïve view that evidence would magically present itself and be automatically believed.

Overall, this study demonstrated the following for each age group:

(1) Four- to Seven-Year-Olds: As a result of their egocentric view of the world, this group of children understood some features of the legal system, but not any definable features. For instance, some children understood that a judge is there to talk and listen, but did not understand that a judge is in charge of the courtroom or determines a sentence. This group was unable to meet the criteria of accuracy for any of the concepts listed above. These children could describe court-related personnel as sitting, talking, and helping but could not say how these people perform their roles nor differentiate between these varied roles. For example, the children interchanged the roles of court, police, and prison and were confused as to whether judges remain judges when they go home at night. This group also understood that witnesses had to tell the truth, but only thought that witnesses did so to avoid being punished. Additionally, these children believed that all evidence was necessarily true. The children had blind faith that witnesses tell the truth and, if witnesses themselves, would be surprised by a confrontational cross-examination or repeated interviews which are not consistent with that blind faith. These

children further believed that the court process ultimately led to jail and the children could only describe court from the point of view of someone who was in trouble.

(2) Eight- to Eleven-Year-Olds: Children of this group were able to view court as a place to work out disagreements, but still struggled with defining features between juries and judges. However, these children were better able to understand that judges determine guilt or innocence and decide punishment. They also viewed court similar to church (“You have to be quiet and serious”), and that lawyers help people, are on your side (which shows some understanding of the adversarial process), and stand up for you in court (which shows representational awareness). This group of children showed increased understanding of the differing roles of court-related people, the court process and its function. These children were less likely to confuse the roles of the court and the police. Under the age of ten, children do not understand what a jury does and they still confuse the word with similar sounding words. Between ages eight and eleven, the children studied did not understand that impartial people sit as jurors and instead believed that victims, witnesses, and defendant’s friends are on the jury. This group did not understand that the jury decides the outcome of the case.

(3) Twelve- to Fourteen-Year-Olds: This group was able to understand the court process and place it in context with the overall government. At this age, these children became aware of the function of juries, but are still confused about the role of the jury in making decisions. Some children believe that the judge and jury work together to make a decision. This demonstrates that children do not understand the need to communicate to the jury rather than the judge. The children in this group could understand factors that would be considered when determining credibility (such as facial expressions, reputation, personality, comparison with corroborating evidence, etc.).

#### 1990 Saywitz Study: “Children’s Knowledge of Legal Terminology”

Dr. Saywitz conducted a second study that analyzed whether age and grade-related patterns would be found when testing children on commonly used court terms.<sup>114</sup> Children were grouped according to school grades, given a list of 35 legal terms and asked to tell everything they knew about each word. The study showed that some legal terms had significant grade-related trends. Some terms, which were accurately defined by the sixth graders, were largely inaccurate for the kindergartners, such as: “oath,” “deny,” “lawyer,” “date,” “sworn,” “case,” “jury,” “witness,” “judge,” “attorney,” “testify,” and “evidence.” On the other hand, some legal terms did not have grade-related trends because children in all three groups equally understood or misunderstood the term. Terms that were easy for all groups of children to describe accurately were: “lie,” “police,” “remember,” “truth,” “promise,” and “seated.” Terms that were difficult for all groups of children to describe accurately were: “charges,” “defendant,” “minor,” “motion,” “competence,” “petition,” “allegation,” “hearing,” and “strike.”

The study also considered if the age of the children contributed to whether an unfamiliar word was mistaken for a similar sounding word (e.g., jury was mistaken for jewelry) or whether a word had another meaning outside the court system (e.g., “motion is like waving your arms”). These two types of errors were found to be grade-related insofar as the sixth graders made

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<sup>114</sup> Karen Saywitz, Carol Jaenicke & Lorinda Camparo, *Children’s Knowledge of Legal Terminology*, 14 L. & HUM. BEHAV. 523 (1990).

significantly fewer of these errors than the third graders or kindergartners. For example, 19 of 20 kindergartners and 18 of 20 third graders erred with the word “hearing,” whereas only 7 of 20 sixth graders made the same error. This demonstrated that the older children were able to understand that familiar words may have a different meaning in the court system.

This study demonstrated that “a majority of legal terms tested were not accurately defined until the age of 10.”<sup>115</sup> Of interest is that younger children admitted lack of knowledge or unfamiliarity with a legal term more frequently than older children. Thus, older children may answer a question concerning a court term, yet not understand the term or the question. On the other hand, younger children may think that they understand the meaning of the term and may testify accordingly, when in fact they have a different meaning in their mind than the adult does. The younger children’s resistance to the prompt, “Could it mean anything else in a court of law?” suggests that they had limited metacognitive ability to foresee that a term would mean something else in a different, potentially unfamiliar, context. Moreover, it may be difficult for them to shift from one context to another or to continue to generate alternate solutions.<sup>116</sup> However, by third grade, children may be able to fit familiar terms into a different context, such as a court setting.

Thus, even if a child within the age-frame of this study is informed during a forensic interview that his or her statements may be used in a court proceeding, this does not necessarily mean that the child understands what court is or what the purpose of court is. Furthermore, it is reasonable to conclude that if such information is not provided to a child during a forensic interview, it is even less likely that the child will intuitively understand the function of court or that the interview may be used in a criminal prosecution.

#### 1989 Warren-Leubecker Study: “What Do Children Know about the Legal System and When Do They Know It?”

This study from Australia researched the developmental trends in children’s perceptions of the legal system, court-related personnel, reasons for going to court, and how decisions are made.<sup>117</sup> The study involved children ranging from two years and nine months to fourteen years in age. The children were asked 23 questions, six of which are included below:

1. **Do you know what a courtroom is?** 18% of three-year-olds, 40% of six-year-olds, 85% of seven-year-olds, and up to 100% of thirteen-year-olds answered “yes.”
2. **Who is in charge of the courtroom?** 82% of the three-year-olds indicated they did not know and the remaining 18% answered incorrectly (e.g., a doctor). Answering the judge was in charge of a courtroom were 15% of four-year-olds, 25% of five-year-olds, 56% of six-year-olds, 73% of seven-year-olds, and 92% of eight-year-olds.

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<sup>115</sup> Id. at 531.

<sup>116</sup> Id. at 532.

<sup>117</sup> Amye Warren-Leubecker, Carol S. Tate, Ivora D. Hinton and Nicky Ozbek, What Do Children Know about the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research, Perspectives on Children’s Testimony 158-183 (S.J. Ceci, D.F. Ross & M.P. Toglia eds., 1989).

3. **Who else is in the courtroom (besides the judge)?** The chart below demonstrates the percentage of correct answers according to age.

	Age in years/Percentage Correct										
	3	4	5	6	7	8	9	10	11	12	13
<b>Jury</b>	0	0	3	4	8	13	19	28	38	38	40
<b>Lawyer</b>	0	0	3	0	8	15	31	44	36	40	20
<b>Witness</b>	0	11	3	0	0	28	23	20	16	19	30
<b>Police</b>	0	11	10	26	15	36	26	17	23	34	30
<b>Defendant</b>	0	7	0	0	8	15	19	28	27	21	20
<b>Plaintiff</b>	0	0	0	0	4	8	10	15	19	17	20
<b>Audience</b>	9	0	0	4	4	3	2	4	7	2	20
<b>Bailiff</b>	0	0	0	4	4	0	4	6	9	15	0
<b>Court Clerk/Reporter</b>	0	0	0	0	0	3	3	14	15	9	0

4. **What does a lawyer do?** Children under the age of seven did not know what a lawyer does. When children reached age ten they began to distinguish between attorneys who prosecute or defend others.

5. **What is the jury and what do they do?** A large number of children mistook the word “jury” for “jewelry” and were unable to answer this question. In general, it was not until age ten that a significant number of children could understand that a jury is involved in decision-making. However, at age twelve, 30% of these children still did not understand the role of a jury in court.

6. **Why do people go to court?** A significant number of younger children did not know or were not able to provide a reason as shown by these percentages: 91% of three-year-olds; 75% of four-year-olds; 62% of five-year-olds; 43% of six-year-olds; 27% of seven-year-olds; 15% of eight-year-olds; and not until age thirteen were all children able to provide an answer.

The results above clearly demonstrate that none of the age groups in the study showed a majority understanding of court-related terms, the players involved in court proceedings, the purpose of court proceedings, or the most basic level of the purpose of court. Again, this study is consistent with the above-mentioned prior studies in showing that children, particularly under the age of ten, do not understand the court process objectively and consequently cannot understand that their out-of-court statements may be used in court.

#### 1989 Flin Study: “Children’s Knowledge of Court Proceedings”

A study from the United Kingdom replicated the findings in the studies above.<sup>118</sup> Children ages six, eight and ten were given twenty legal terms, as well as questions regarding court procedures. Consistent with other studies, the ten-year-old children understood more legal terms than the younger children. Only four terms (“policeman,” “rule,” “promise,” and “truth”) did not show a

<sup>118</sup> Rhona H. Flin, Yvonne Stevenson, Graham M. Davies, *Children’s Knowledge of Court Proceedings*, 80 BRITISH J. OF PSYCH. 285-297 (1989).

significant difference in accuracy between the age groups. However, terms like “going to court,” “evidence,” “jury,” “lawyer,” “prosecute,” “trial,” and “witness” were clearly not understood by the six- and eight-year-old children and only nominally by the ten-year-olds. When asked what kind of people go to court, children ages six and eight did not know or believed that only bad people went to court. However, by age ten, these children understood that all types of people could be involved in court proceedings.

#### 1997 Aldridge Study: “Children’s Understanding of Legal Terminology”

A study of British children age five to ten focused on child witnesses’ understanding of the legal system.<sup>119</sup> This study found that children do not begin to understand what a witness is or what a judge is/or does until age ten; none of the children in the study had ever heard the word “prosecution,” except for one child who said “prosecution’s when you die. You get hanged or something awful like that.” In defining what court is, the children studied had the following answers: one five-year-old stated “a court is a sort of jail;” one seven-year-old said that witnesses “whip people when they are naughty”; another seven-year-old said “the police think that witnesses have done something naughty”; and one seven-year-old described a judge as “someone who gets money, like at a pet show.”

#### 1998 Berti Study: “Developing Knowledge of the Judicial System”

Similar results as the Saywitz (1989), Warren-Leubecker (1989), and Flin (1989) studies were found in an Italian study from 1998.<sup>120</sup> Of particular interest were the student responses to the question about what court is: 75% of first graders (mean age 6.7) did not know; 45% of third graders (mean age 8.6) did not know; 15% of fifth graders (mean age 10.7) did not know; and 5% of eighth graders (mean age 13.8) did not know. In response to describing a public prosecutor, all first and third graders either did not know or had never heard of a prosecutor; only 1 of 20 fifth graders and 4 of 20 eighth graders accurately described a prosecutor. The younger children similarly had difficulty understanding or describing a judge, witness, lawyer, or jury. None of the first and third graders understood that a judge must study law to be a judge, whereas 18% of fifth graders and 94% of eighth graders understood this concept. Therefore, young child witnesses or victims may not understand the role of a judge when testifying.

Overall, results of these six research studies are similar. Conservatively, each indicates that children under the age of ten do not comprehend legal terms, the nature or process of court proceedings, or the individuals involved in court proceedings. As such, the logical conclusion is that young children cannot independently appreciate that statements made during a forensic interview would later be introduced in a court proceeding. These studies demonstrate that an objective person standard cannot be applied to young children under the age of ten. Instead, the above research amply supports the creation of a “reasonable child” standard in determining whether out-of-court statements by children are testimonial in light of the *Crawford* decision.

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<sup>119</sup> Michelle Aldridge, Kathryn Timmins, Joanne Wood, *Children’s Understanding of Legal Terminology: Judges Get Money at Pet Shows, Don’t They?* 6 CHILD ABUSE REV. 141-146 (1997).

<sup>120</sup> Anna Emilia Berti & Elisa Ugolini, *Developing Knowledge of the Judicial System: A Domain-Specific Approach*, J. OF GENETIC PSYCH. 159(2), pp. 221-236 (1998).

## VI. A PROPER APPLICATION OF THE REASONABLE CHILD STANDARD: A CASE ANALYSIS OF BOBADILLA v MINNESOTA

In *State v. Bobadilla*,<sup>121</sup> a three-year-old victim disclosed penetration by the defendant to his mother. At a forensic interview with a CPS worker and police officer, the child also disclosed penetration. At a competency hearing, the three-year-old was declared incompetent to testify. At trial, and prior to the decision in *Crawford*, the prosecutor admitted all the child's statements, including the videotaped forensic interview. The Minnesota Court of Appeals subsequently applied *Crawford* and declared the forensic interview to be testimonial and not admissible because the "...child-protection worker interviewed [the child] in the presence of [the] Detective. She asked [the child] whether anyone had hurt him, who hurt him, and how he was hurt. These circumstances clearly indicate that the interview was conducted for the purpose of developing a case against Bobadilla, and therefore, the answers elicited were testimonial in nature." However, the child's statements to his mother were not testimonial because the mother questioned the child about the redness around his anus out of concern for his health, not because she expected to develop a case against Bobadilla. The Minnesota Court of Appeals failed to address the objective reasonable expectation factor. The Minnesota Supreme Court overturned this ruling and permitted introduction of the child's forensic interview.

The American Prosecutors Research Institute, in collaboration with the Minnesota Attorney Generals Office, filed an Amicus Brief with the Minnesota Supreme Court addressing the child development research previously discussed. An argument was made for the necessity of a reasonable child standard for purposes of *Crawford*. The Minnesota Court of Appeals had already acknowledged the difficulty of *Crawford* in relation to young children in *State v. Scacchetti*.<sup>122</sup> In that case, a three-year-old child was discovered by her mother to have bruises, a swollen face, and blood in her underwear after having been left in the care of the defendant. The mother took the child to the hospital for a medical examination. An emergency room physician at the Children's Hospital of Minneapolis discovered a "possible hymen abnormality" and called a specialist with the Midwest Children's Resource Center, a department of the hospital, to conduct a further examination. A nurse practitioner examined the child, which included taking a verbal history. When examining the child's anal and vaginal areas and when asked if anything touched there to cause the noticeable redness, the child said "Tony's pee pee." The child made additional disclosures of touching by the defendant during this videotaped examination. At trial, the child did not testify, but the nurse practitioner testified and the videotape of her conversation with the child was shown to the jury. The defendant was convicted and on appeal, the defendant claimed a violation of his Sixth Amendment rights and cited *Crawford* in support.

In upholding the conviction and declaring the videotaped statements to the nurse as non-testimonial, the *Scacchetti* court reasoned as follows:

On remand, Scacchetti argues R.J.'s disclosures to Edinburgh fall within the third and broadest, proposed formulation of testimonial statements because Edinburgh

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<sup>121</sup> 709 N.W.2d 243 (Minn. 2006).

<sup>122</sup> 690 N.W.2d 393 (Minn. Ct. App. 2005).

‘does not provide ongoing care for children,’ ‘clearly [knew] that her examinations may be used as evidence in the criminal case,’ and ‘always tapes interviews.’ But in order for Scacchetti to succeed on this argument, he must show, under *Crawford*, that the circumstances surrounding the contested statements led the three-year-old to reasonably believe her disclosures would be available for use at a later trial, or that the circumstances would lead a reasonable child of her age to have that expectation. See *Crawford*, 124 S. Ct. at 1364. Scacchetti's arguments fail to show this.<sup>123</sup>

Thus, the *Scacchetti* court began to lay the foundation for the creation of a “reasonable child” standard when analyzing child statements pursuant to *Crawford*.

In discussing a “reasonable child” standard, the Minnesota Supreme Court held in *D.M.S. v. Barber*.<sup>124</sup>

[A] reasonable person under the legal disability of infancy is incapable of recognizing or understanding that he or she has been sexually abused. The delayed discovery statute provides that the six-year period of limitation does not begin to run until a reasonable person would know of the sexual abuse. Minn. Stat. § 541.073, subd. 2(a); see, *Blackowiak v. Kemp*, 546 N.W.2d 1, 3 (Minn. 1996). Thus, it follows that the six-year period of limitation does not begin to run on a cause of action arising from childhood sexual abuse until the victim reaches the age of majority.

Thus, a “reasonable person” standard for children takes into account the abilities of children by acknowledging that infancy is a “legal disability” requiring a different standard of assessment.

Likewise, as discussed in *Toetschinger v. Ihnot*,<sup>125</sup> when assessing the level of negligence of children in personal injury matters, Minnesota courts have consistently held “[i]n the case of a child, reasonable care is that care which a reasonable child of the same age, intelligence, training and experience as Paul Toetschinger at the time of the accident would have used under like circumstances.”<sup>126</sup>

The Minnesota Supreme Court issued its decision in *Bobadilla* in February 2006 and held that the child’s statements during the forensic interview were not testimonial. In determining whether the child’s statement was testimonial, the Court held “when both a questioner and a declarant are not, to any substantial degree, acting with an eye toward trial, courts have

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<sup>123</sup> *Scacchetti*, 690 N.W.2d at 396.

<sup>124</sup> 645 N.W.2d 383, 389 (Minn. 2002).

<sup>125</sup> 250 N.W.2d 204, 217 (Minn. 1977).

<sup>126</sup> See also, *Rosvold v. Johnson*, 169 N.W.2d 598 (Minn. 1969); *Pelzer v. Lange*, 93 N.W.2d 666 (Minn. 1958); *Bruno v. Belmonte*, 90 N.W.2d 899 (Minn. 1958); *Watts v. Erickson*, 69 N.W.2d 626 (Minn. 1955); *Audette v. Lindahl*, 42 N.W.2d 717 (Minn. 1950); *Eckhardt v. Hanson*, 264 N.W. 776 (Minn. 1936).

consistently held that the declarant’s statements are not testimonial.”<sup>127</sup> The Court went on to explain that even if a questioner and declarant have multiple purposes, one of which may include an eye toward trial, this does not automatically declare the statement to be testimonial.

For instance, a police officer will often be acting, to at least some degree, with an eye toward trial, even when responding to an emergency. But where preservation for trial is merely incidental to other purposes, such as assessing and responding to an immediate danger, a statement will not be deemed testimonial. See, e.g., *Hammon*, 829 N.E.2d at 458 (statement was not testimonial where an officer taking a statement “was principally in the process of accomplishing the preliminary tasks of securing and assessing the scene”).<sup>128</sup>

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Finally, we note that an inquiry into the purpose of a reasonable government questioner or declarant in the relevant situation also conforms with *Crawford*’s core categories of testimonial statements—“prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and \* \* \* police interrogations”—since a reasonable questioner taking a statement in any one of those situations would always exhibit a substantial concern with producing a statement for use in legal proceedings.<sup>129</sup>

Commenting on the forensic interviewing procedure, the Court noted, “the CornerHouse technique instructs the interviewer to ask nonleading questions, to use terms children would understand, and to progress quickly since young children have short attention spans.”<sup>130</sup>

The *Bobadilla* Court also took an important step in the analysis of forensic interviews after *Crawford* by discussing the purpose of a forensic interview, including statutory requirements to conduct an interview, and what children understand about interviews. The *Bobadilla* Court distinguished all prior cases finding forensic interviews to be testimonial by noting “these cases have consistently determined that children’s statements are testimonial in situations where either the declarant or government questioner was acting, to a substantial degree, in order to produce a statement for trial.”<sup>131</sup> Articulating the reasons that this forensic interview was non-testimonial, the court reasoned as follows:

But in this case, neither the child-protection worker nor the child declarant, T.B., were acting, to a substantial degree, in order to produce a statement for trial. The parties do not dispute that the interview of T.B. was conducted in accord with a

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<sup>127</sup> *Bobadilla*, 709 N.W.2d at 251.

<sup>128</sup> *Bobadilla*, 709 N.W.2d at 252.

<sup>129</sup> *Bobadilla*, 709 N.W.2d at 253.

<sup>130</sup> *Bobadilla*, 709 N.W.2d at 247. The R.A.T.A.C. forensic interviewing protocol created by CornerHouse is the protocol taught through the *Finding Words* program and used throughout the country to interview children.

<sup>131</sup> *Bobadilla*, 709 N.W.2d at 253.



statutory scheme for reporting, investigating, and responding to threats to children's health or welfare. Minn. Stat. § 626.556 (2004). This statutory scheme provides that certain individuals must report the maltreatment of minors either to law enforcement or to the local welfare agency. *Id.* Following a report of abuse, "the local welfare agency shall immediately conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible." Minn. Stat. § 626.556, subd. 10(a). To the extent that an allegation of abuse alleges a violation of a criminal statute, the local welfare agency and law enforcement must "coordinate the planning and execution of their respective investigation and assessment efforts to avoid a duplication of fact-finding efforts and multiple interviews." *Id.* Both the welfare agency and law enforcement must prepare separate reports. *Id.* The local welfare agency is required to use a "nondirective" question-and-answer format and to make audio-video recordings of the interviews of alleged victims of sexual abuse. Minn. Stat. § 626.556, subd. 10(j)(2).<sup>132</sup>

Thus, Minnesota has recognized that children should not be held to adult standards. Therefore, when assessing whether a child could reasonably understand that statements made during a forensic interview could later be used prosecutorially or in court, a "reasonable child" standard should be applied consistent with child development research.

Minnesota is not the only state to recognize the special needs of child victims and witnesses. As outlined in Section IV(B)(2), courts in Colorado, Massachusetts, North Carolina, Ohio, Texas, Washington, and the Military Court of Criminal Appeals have also accurately discussed what is reasonable for an objective child to understand about the investigation and court process during the phase of a forensic interview.

## VII. A PROPER APPLICATION OF THE PRIMARY PURPOSE STANDARD TO FORENSIC INTERVIEWS

Since the decision in *Davis/Hammon*<sup>133</sup>, courts are beginning to abandon the objective reasonable declarant analysis outlined in *Crawford*<sup>134</sup> in favor of determining the primary purpose of the interview when questions are being asked by law enforcement officers. Although abandoning the objective reasonable standard is not in-line with *Crawford*, in situations where a law enforcement officer has questioned a child regarding abuse or neglect, or witnessing a crime, the officer's purpose does not automatically determine that the child's statements are testimonial or not pursuant to *Davis/Hammon*. As stated earlier, it is important to understand the nuances of *Davis/Hammon*, including looking objectively at all the circumstances occurring when the

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<sup>132</sup> *Bobadilla*, 709 N.W.2d at 254.

<sup>133</sup> *Davis/Hammon*, 126 S. Ct. 2266 (U.S. 2006).

<sup>134</sup> *Crawford*, 514 U.S. 36 (2004).

statement was being taken.<sup>135</sup> This is not limited solely to the primary purpose of the law enforcement investigator. Rather, a court should look to all the circumstances, including the mind set of the child.

In *Minnesota v. Warsame*<sup>136</sup>, the Minnesota Court of Appeals addressed the primary purpose standard by viewing a number of different factors. A police officer was responding to a domestic violence complaint when he found the victim on the side of the road. When the officer approached her, she stated “my boyfriend just beat me up” and the officer determined that this was the victim from the call. In response to an open ended question, the crying and shaking victim provided detail regarding the assault, including that her sisters were present in the home during the assault. The defendant had also fled the home with one of the victim’s sisters. At trial, the victim did not appear and the issue on appeal was whether the victim’s statements to the officer violated the Confrontation Clause. In analyzing the case under *Davis/Hammon*, the Court acknowledged that a statement, even under an excited state of mind, can move from non-testimonial to testimonial. The question was where to draw the line?

The Court found that an on-going emergency existed during the open-ended part of her statement and noted that the defendant had fled with one of the sisters was an important factor to consider.

By contrast, the situation confronting police here was more complex. Although Warsame had left the scene of the alleged assault, he was reported to be with one of the victim's sisters, and the other sister, possibly injured, remained at the scene of the alleged assault, which was a short distance from where the questioning of N.A. occurred. In this case, unlike the situations in *Davis* and *Hammon*, police faced possible emergency situations regarding three locations: the street curb, where N.A. was being attended to, the house nearby, where her sister I.A. remained, and the fleeing vehicle, where another sister was with Warsame.

We conclude that the "ongoing emergency" referred to in *Davis* as marking out-of-court statements non-testimonial need not be limited to the complainant's predicament or the location where she is questioned by police. As long as a possible emergency situation, occurring at another location or involving another person, is related to the complainant's own situation and is one which can be clarified by questioning her, the purpose of the questioning may be considered as for the primary purpose of enabling police assistance to meet an ongoing emergency, making the complainant's statements non-testimonial.<sup>137</sup>

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<sup>135</sup> *Davis/Hammon*, 2006 U.S. LEXIS 4886, at \*16.

<sup>136</sup> No. A05-488, 2006 Minn. App. LEXIS 154 (Minn. Ct. App. Nov 21, 2006).

<sup>137</sup> *Id.* at \*11-12.

In finding the initial narrative account from the victim was non-testimonial due to the on-going emergency involving other potential victims, the Court also noted that the officer was not taking notes as he was gathering this initial information and that also contributed to the non-testimonial nature of the situation.<sup>138</sup> This analysis can become important when addressing statements made by child victims and witnesses. The *Warsame* Court looked to whether there were other victims in jeopardy, including other people in the home, and whether the defendant had access to those potential victims. In most child abuse cases, the perpetrator is a family member.<sup>139</sup> For those cases where there are other children in the home, a factor that must be addressed during a forensic interview, even if conducted by a law enforcement officer, is whether there are other children in jeopardy that need immediate protection and possible removal from the home. Even if the child being interviewed is safely out of the home, the interviewer must determine whether the perpetrator is residing in the home and whether other children are at risk. Therefore, when addressing the primary purpose of a law enforcement officer's interview, the existence of other children at risk in the home should be addressed in determining whether the emergency is on-going. If children are in the home, the danger and emergency is on-going and the interview should be deemed non-testimonial.

If courts adopt the *Davis/Hammon* primary purpose standard for child statements, it is necessary to remember that the objective circumstances must also be viewed when determining whether a statement is testimonial. As such, a young child's statement should never be deemed testimonial for these reasons: (1) most states require forensic interviews of children to protect the health and welfare of the child;<sup>140</sup> (2) the forensic interview is not conducted primarily for prosecution, but serves the needs of multiple team members, including law enforcement, child protection, health care providers, mental health professionals, and prosecution authorities;<sup>141</sup> (3) forensic interviews conducted under the Child First Doctrine are not for the primary purpose of prosecution;<sup>142</sup> (4) considering the developmental and cognitive abilities of children when making statements of abuse is still a factor to be addressed when looking objectively at the circumstances of the interview as outlined in *Davis/Hammon*;<sup>143</sup> and (5) in viewing the objective circumstances surrounding the child's statement, a court must look to all factors including the child's belief about future court use of the statement, the primary purpose of the interviewer

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<sup>138</sup> *Id.* at \*16.

<sup>139</sup> "In 2002, one or both parents were involved in 79 percent of child abuse or neglect fatalities." *Child Abuse and Neglect Fatalities: Statistics and Intervention*, in NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION (April 2004), available at <http://www.childwelfare.gov/pubs/factsheets/fatality.pdf>. "Nearly 84 percent (83.4%) of victims were abused by a parent acting alone or with another person. Approximately two-fifths (38.8%) of child victims were maltreated by their mothers acting alone; another 18.3 percent were maltreated by their fathers acting alone; 18.3 percent were abused by both parents." *Child Maltreatment 2004*, in U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES 28 (Washington DC: U.S. Government Printing Office, 2006), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf>.

<sup>140</sup> See footnote 51.

<sup>141</sup> See Section IV(A).

<sup>142</sup> See footnote 50.

<sup>143</sup> See Section V.

asking the questions, whether there is an on-going emergency, whether additional children or potential victims are still within the abusive home, and other surrounding circumstances.

### VIII. STATEMENTS OF CHILDREN DURING MEDICAL EXAMINATIONS SHOULD BE NON-TESTIMONIAL STATEMENTS

#### A. Statements Made Pursuant to the Medical Hearsay Exception Should be Non-Testimonial Since Health Care Providers are not Governmental Agents

Health care providers are, with more frequency, interviewing and taking statements from children regarding incidents of abuse. As such, these health care providers have been put into the framework as some forensic interviewers and are now having to defend their interview after *Crawford*. Federal Rule of Evidence 803(4) is the medical diagnosis and treatment exception to the hearsay rule which allows medical professionals to testify to statements made by a patient during a medical examination. These statements are allowed into evidence, in spite of a preclusion against hearsay testimony, for the reason that statements made by a patient to a doctor are presumed inherently truthful. A patient is expected to be honest with a health care provider in order to receive an accurate diagnosis and appropriate treatment.

After the new rule of *Crawford*, most courts have agreed that physicians who conduct a medical examination of a victim can still testify to statements of the victim that pertain to the diagnosis and treatment for the reason that the health care provider has a job to perform in assisting the patient regardless of prosecution or collection of evidence. As such, this non-governmental agent does not meet the parameters outlined in *Crawford*.<sup>144</sup> Statements made to Emergency Medical Technicians (EMTs) have also been permitted into evidence through the medical hearsay exception, even after *Crawford*.<sup>145</sup> Psychological professionals have also been permitted

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<sup>144</sup> State v. Saunders, 132 P.3d 743 (Wash. Ct. App. 2006); People v. Purcell, 846 N.E.2d 203 (Ill. App. Ct. 2006); State v. Fisher, 108 P.3d 1262 (Wash. Ct. App. 2005); United States v. Peneaux, 432 F.3d 882 (8<sup>th</sup> Cir. 2005); State v. Johnson, No. 0411007637, 2005 Del. Super. LEXIS 253 (Del. Super. Ct. 2005); People v. Cage, 120 Cal. App. 4th 770 (Cal. Ct. App. 2004); State v. Davis, 2005 Ohio 6224 (Ohio Ct. App. 2005) (statements to a paramedic and physician are non-testimonial); State v. Molina, No. 53730-0-I, 2005 Wash. App. LEXIS 2058 (Wash. Ct. App. 2005) (“The appellate court found that the doctor asked how the victim got the wound. She responded that her ex-boyfriend stabbed her. The victim's response was necessary to ascertain the nature of the wound inflicted and to provide her with appropriate medical treatment. The statement was reasonably pertinent to diagnosis and treatment of her injuries. Her statements were admissible under the statement for medical treatment exception of Wash. R. Evid. 803(a)(4) because a doctor or social worker may recommend counseling or escape from the dangerous domestic environment as part of a treatment plan.”); State v. Vaught, 682 N.W.2d 284 (Neb. 2004) (statements of a four-year-old victim of sexual abuse to a physician, including the identity of the assailant, were held non-testimonial. “We believe on the facts of this case that the victim's statement to the doctor was not a “testimonial” statement under *Crawford*. As discussed above, the victim's identification of Vaught as the perpetrator was a statement made for the purpose of medical diagnosis or treatment. In the present case, the victim was taken to the hospital by her family to be examined and the only evidence regarding the purpose of the medical examination, including the information regarding the cause of the symptoms, was to obtain medical treatment. There was no indication of a purpose to develop testimony for trial, nor was there an indication of government involvement in the initiation or course of the examination.”)

<sup>145</sup> State v. Saunders, 132 P.3d 743 (Wash. Ct. App. 2006) (The identity of her assailant was allowed into evidence through the testimony of the paramedics since it related to the paramedic’s diagnosis and treatment of the victim.)

to testify concerning statements made by victims as these statements relate to diagnosing and treating the patient.<sup>146</sup> The primary concern about medical statements after *Crawford* relate to SANE/SAFE professionals examining the victim and taking statements concerning the crime.

B. Sexual Assault Nurse Examiners (SANEs) and Sexual Assault Forensic Examiners (SAFEs) May Assist with the Collection of Evidence for Law Enforcement, but Victim/Patients Likely do not Understand that their Statements During a Medical Examination Could be Introduced in Court

There has been great concern about the role of SANE/SAFE professionals<sup>147</sup> in a post-*Crawford* world. SANEs are specially trained in taking a history for purposes of diagnosis and treatment and the collection and preservation of evidence. SANEs have four primary goals: 1) to take a history for the purpose of diagnosis and treatment; 2) to provide a head to toe assessment for trauma; 3) to perform a detailed genital examination; and 4) to collection of evidence. All of this is conducted during a compassionate and caring medical-legal evaluation that should include diagnosis and treatment relating to the sexual assault, crisis intervention, and referrals for follow-up care.<sup>148</sup>

With the intertwining of forensic evidence collection and law enforcement interviews, can SANE and SAFE professionals still testify in court regarding medical statements made by victims? Are they just another arm of law enforcement performing the duties of the investigating officer? If a victim (whether child or adult) is examined by a trained SANE or SAFE professional for purposes of gathering evidence of a crime, will statements by the victim be deemed testimonial thus requiring the victim to testify? We can gain some insight in how to proceed with these medical interviews based on the following cases.

In *Commonwealth v. Brown*,<sup>149</sup> the Court of Appeals of Virginia concluded that the medical notes and records created by a SANE (who was deceased at the time of trial) were non-testimonial because the trial court redacted any accusatory statements from the report and that the remainder of the report was as a result of a physical examination and not created in an adversarial setting. In clarifying its ruling, the court compared SANE records to laboratory results, which have been held to be non-testimonial in other jurisdictions. “Critically, such laboratory reports do not involve statements to the police or other government agents acting in their stead, which accuse another person of a crime. (citations omitted) Such reports are, moreover, not prepared in an adversarial setting.”<sup>150</sup> The court noted that SANE reports are not created for the benefit of

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<sup>146</sup> State v. Sheppard, 842 N.E.2d 561 (Ohio Ct. App. 2005).

<sup>147</sup> A Sexual Assault Nurse Examiner (SANE) is a Registered Nurse who is specially trained in the forensic examination of sexual assault victims. A Sexual Assault Forensic Examiner (SAFE) is not a registered nurse, but is trained to conducted sexual assault examinations.

<sup>148</sup> OFFICE FOR VICTIMS OF CRIME, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, SEXUAL ASSAULT NURSE EXAMINER DEVELOPMENT AND OPERATION GUIDE P. 8. (1999)

<sup>149</sup> No. 3082-05-1, 2006 Va. App. LEXIS 152 (Va. Ct. App. 2006).

<sup>150</sup> *Brown*, 2006 Va. App. LEXIS 152 at \*7-9.

prosecution and that medical examination is conducted “before a suspect is identified or even before a homicide is suspected.”<sup>151</sup>

Similarly, *Ohio v. Lee*<sup>152</sup> addressed statements made by an adult sexual assault victim to a SANE. The Ohio Court of Appeals found that the statements of the victim to the SANE during the examination were non-testimonial:

However, there is no reason for a rape victim to believe that when she reiterates those same statements to a sexual assault nurse that they will be used for anything other than treatment. As such, upon being referred to DOVE<sup>153</sup> and signing a medical consent form, a reasonable person would believe that DOVE served two functions: 1) providing medical treatment to the victim; and 2) preserving physical evidence of the crime. The “white smock of a medical professional” is indeed relevant to our analysis. The victim in these cases is being treated by a nurse. In the instant case, no law enforcement officials were present at any time before, during, or after the examination. As such, there is no reason to conclude that a reasonable person under the same circumstances confronting the rape victim would believe that her nurse is acting as an investigatory arm of the State when questioning the victim about details of the crime.<sup>154</sup>

*State v. Stahl*, 2005 Ohio 1137 (2005), also held that statements to a nurse by a sexual assault victim can be properly admitted under the medical hearsay exception as they are non-testimonial statements not intertwined with law enforcements’ investigatory duties. However, the Nevada Supreme Court held in *Medina v. State*,<sup>155</sup> that statements made by an adult sexual assault victim to a SANE were testimonial. The court affirmed the conviction and found the error to be harmless. Nonetheless, the court’s reasoning is important to understand as it relates to health care providers diagnosing and treating patients, or collecting evidence for law enforcement:

During trial, [the SANE examiner] testified as to what [the victim] told her about the rape during the sexual assault examination. ... In *Flores*, this court held that the witnesses’ hearsay testimony violated the Confrontation Clause because the witnesses were either police operatives or were tasked with reporting instances of child abuse for the prosecution. Here, [the SANE examiner] was a police

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<sup>151</sup> *Brown*, 2006 Va. App. LEXIS 152 at \*9 (citing footnote 3).

<sup>152</sup> 2005 Ohio 996 (Ohio Ct. App. 2005).

<sup>153</sup> “The Summa DOVE Program, (Developing Options for Violent Emergencies), provides compassionate care to victims of domestic violence, sexual assault, elder abuse, and neglect. One of the first of its kind in the United States, the Summa DOVE program provides specialized medical care to victims, assists law enforcement personnel through the timely and comprehensive collection of evidence from suspects of violent crimes and provides specialized clinical education to health care providers to increase the quality of medical care available to victims of violence.” See, <http://www.summahealth.org/common/templates/contentindex.asp?ID=337>.

<sup>154</sup> *Lee*, 2005 Ohio 996 at P8.

<sup>155</sup> 131 P.3d 15 (Nev. 2006).

operative. She testified that she is a "forensics nurse" and that she gathers evidence for the prosecution for possible use in later prosecutions. As such, the circumstances under which [the victim] made the statements to [the SANE examiner] would lead an objective witness to reasonably believe that the statements would be available for use at a later trial. [The victim] was not available for trial, and Medina had no prior opportunity to cross-examine her regarding the statements to [the SANE examiner]. Therefore, the district court manifestly erred when it admitted the statements [the victim] made to [the SANE examiner] during the sexual assault examination.<sup>156</sup>

Other courts have effectively addressed the importance of child statements to medical professionals and properly analyzed the child's understanding at the time of making the statement. The case of *People v. Vigil*,<sup>157</sup> as discussed in Section IV(B)(2), accurately assessed what an objective seven-year-old would reasonably expect in being interviewed by a physician regarding abuse. Similarly, in *Ohio v. Edinger*,<sup>158</sup> the child was interviewed by a social worker employed by Children's Hospital in the Child Advocacy Center. At trial, the social worker testified that the sole purpose for the interview with the child was for medical diagnosis and treatment. The role of the social worker was not to report to the police or be involved in removing the child from the home. Although the police were allowed to observe the interview via closed circuit television, the police did not arrange the interview and the child was not aware that the police were observing.

*Ohio v. Muttart*<sup>159</sup> addressed statements of children ages 5 and 6 to health care providers. The court found their statements to medical personnel to be non-testimonial. In this case, three separate interviewers/counselors obtained statements from the children solely for medical and psychological purposes. One interviewer worked at Children's Hospital and obtained the medical and social history from the child before a medical exam. The other two interviewers were licensed clinical counselors; one conducted the initial assessment in order to make a diagnosis, and the second conducted play therapy. The court noted that with one child, there was no police involvement prior to the counselors' speaking with the child and that all three counselors acted independent from any subsequent police involvement. These therapeutic interviews with the child had no law enforcement involvement and, therefore, were not testimonial.

In *Minnesota v. Scacchetti*,<sup>160</sup> the three-year-old child was not competent to testify, but statements made by the child to a nurse during a medical assessment were admitted at trial. This court held that the child's statements were non-testimonial and provide important language about

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<sup>156</sup> *Medina*, 131 P.3d at 20-21.

<sup>157</sup> 127 P.3d 916 (Colo. 2006).

<sup>158</sup> 2006 Ohio 1527 (Ohio Ct. App. 2006).

<sup>159</sup> 2006 Ohio 2506 (Ohio Ct. App. 2006).

<sup>160</sup> 711 N.W.2d 508 (Minn. 2006).

the potential testifying-duty of a nurse examiner. In this case, the nurse followed a protocol that consisted of a verbal exam and physical exam. The exam was videotaped according to protocol which allows for subsequent review by a physician. The nurse saw the child twice: once for an exam and then for a follow-up assessment. The Court relied on eight factors that were set forth in *Minnesota v. Wright*<sup>161</sup> and clarified in *Bobadilla v. Minnesota*<sup>162</sup>: “We clarified that, of the factors, the central considerations are ‘the purpose of the statements from the perspective of the declarant and from the perspective of the government questioner,’ in other words, ‘whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial.’”<sup>163</sup>

The *Scacchetti* court found that the nurse was not a governmental agent since the child did not come for her assessment via a governmental agent. However, the court noted:

Even if we had concluded that [the nurse] was acting in concert with or as an agent of the government, our conclusion that [the child’s] statements to [the nurse] are not testimonial would not change. The record here indicates that [the nurse’s] purpose in interviewing and examining [the child] was to assess her medical condition. Both [the nurse and physician] testified that their purpose in evaluating children such as [this child] is to determine whether the child has been abused and, if necessary, to connect the child and family to appropriate services. There is no evidence or other testimony in the record to the contrary. The fact that MCRC generally does not have ongoing contact with the child after the assessment does not minimize the medical purpose for which the assessment is conducted.<sup>164</sup>

Finally, the court concluded, “the mere fact that [the nurse] may be called to testify in court regarding sexual abuse cases does not transform the medical purpose of the assessments into a prosecutorial purpose, nor is there any evidence that [the nurse] had a prosecutorial purpose here. \*\*\* Thus, even if we were to conclude that [the nurse’s] assessments of the child] had, as a secondary purpose, the preservation of testimony for trial, [the child’s] statement would still not be testimonial. Because the broad purpose of [the nurse’s] assessments was [the child’s] medical health, any subsequent testimony that [the nurse] was required to give did not change her assessment purpose.”<sup>165</sup>

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<sup>161</sup> 701 N.W.2d 802, 812-813 (Minn. 2006). “(1) whether the declarant was a victim or an observer; (2) the declarant's purpose in speaking with the officer (e.g., to obtain assistance); (3) whether it was the police or the declarant who initiated the conversation; (4) the location where the statements were made (e.g., the declarant's home, a squad car, or the police station); (5) the declarant's emotional state when the statements were made; (6) the level of formality and structure of the conversation between the officer and declarant; (7) the officers' purpose in speaking with the declarant (e.g., to secure the scene, determine what happened, or collect evidence); and (8) if and how the statements were recorded.”

<sup>162</sup> 709 N.W.2d 243 (Minn. 2006).

<sup>163</sup> *Scacchetti*, 711 N.W. 2d at 513.

<sup>164</sup> *Scacchetti*, 711 N.W. 2d at 515.

<sup>165</sup> *Scacchetti*, 711 N.W. 2d at 516.



*McDonald v. State*,<sup>166</sup> addressed statements made by a two-year-old during a medical examination. The child told a nurse that "Daddy did it" and "Daddy hit me" during a medical examination. The court held that the child's statements were nontestimonial and exceptions to the hearsay rule in accordance with Tex. R. Evid. 803(4). The Court reasoned "it is illogical to conclude that a two year old child would have considered whether her statements to Rivera regarding bruises on her body would reach prosecutorial authorities and be used against McDonald."<sup>167</sup>

Lastly, *In re A. J. A.*<sup>168</sup> involved a five-year-old child spontaneously disclosing abuse to her parents. The police were contacted and they recommended the parents take the child to the Midwest Children's Resource Center for a medical exam and interview. A registered nurse examined and interviewed the child and then reported her findings to the police as required under Minnesota law. The court found that a reasonable 5-year-old would not expect her statements to the nurse to later be used in court. Therefore, the statements were non-testimonial.

As shown with these cases involving statements made by children during medical examinations, it is important to understand that children may not comprehend that a doctor could take their statements and replay them in a courtroom. Due to the limited cognitive understanding of children about court, making this assumption about children is inaccurate and will result in error by excluding their statement in court.

## VIII. CONCLUSION

As courts continue to struggle to define which out-of-court hearsay statements are "testimonial," the legal implications for child abuse investigations and prosecutions will continue to develop. Although some guidance can be drawn from cases that interpret *Crawford*, it is expected that courts across the country will continue to provide conflicting opinions given that the new rule regarding "testimonial statements" was not fully defined in *Crawford*. Nonetheless, judges, prosecutors and all child protection professionals owe it to their child victims and witnesses to fully understand *Crawford* and properly apply the new rule to cases. Failure to do so will result in countless tragedies in the court system for our most vulnerable victims and offenders remaining free to re-victimize those who need the most protection.

Due to the open interpretation of the term "testimonial" as outlined in *Crawford*, *Davis* and *Hammon*, prosecutors must be educated sufficiently regarding these cases in order to effectively argue a child-friendly standard to the court. Although it may appear that United States Supreme Court, and lower appellate and trial courts, are closing the courtroom doors to young child victims by labeling their out-of-court statements as "testimonial," it is difficult to believe that this is the intention of the Court. However, until the United States Supreme Court accepts a

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<sup>166</sup> No. 04-05-00128-CR, 2006 Tex. App. LEXIS 7416 (Tex. Ct. App. 2006).

<sup>167</sup> *McDonald* 2006 Tex. App. LEXIS 7416 . at \*4.

<sup>168</sup> No. A06-479, 2006 Minn. App. Unpub. LEXIS 988 (Minn. Ct. App. 2006).

child abuse case that involves *Crawford* issues, everyone involved with the criminal justice system will continue to struggle.